

An Application for Reconsideration

- by -

Intech Electric Inc.

- 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: John M. Orr

FILE No.: 2003A/222

DATE OF DECISION: October 21, 2003

DECISION

OVERVIEW

This is an application by Intech Electric Inc. (“Intech”) pursuant to Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of a Tribunal decision #D209/03 (the “Original Decision”) which was issued by the Tribunal on July 3, 2003 without holding an oral hearing.

Intech employed Sheldon Hieb (“Hieb”) as an apprentice from October 2000 until February, 2002 when he left the employment due to shortage of work. After leaving Intech, Hieb filed a complaint that he was not paid properly for overtime. A delegate of the Director of Employment Standards (“the Director”) found that Hieb was indeed entitled to overtime wages. Intech appealed and the appeal was heard by way of written submissions. A key issue for Intech was that the overtime worked was not authorised or condoned by Intech. Intech technically appealed on the ground that there was a denial of natural justice.

An adjudicator of the Tribunal concluded that there was no evidence to support a finding that Intech was denied natural justice in presenting its evidence to the Director. The adjudicator went further to find that “on the merits” there was no evidence of an error on the part of the Director in reaching the conclusions in the Determination.

Intech has requested that the Tribunal reconsider the decision made by the adjudicator in the Original Decision. The reasons cited for requesting the reconsideration are that Intech says its rights as an employer were violated by not having an oral hearing and not being aware that legal representation was possible to protect its rights.

ISSUE

The issue in this application is whether the applicant was entitled to an oral hearing and whether there was any breach of the principles of natural justice in the manner in which the original decision was made.

ANALYSIS

The Tribunal is established and governed by the provisions of the *Employment Standards Act* which addresses the issue of oral hearing in Section 107 as follows:

107. Subject to any rules made under section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

This section has been considered by the Tribunal on a number of occasions and the Tribunal has developed the principle that generally the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring that each party can state its case fairly; *D. Hall & Associates Ltd.* [2001] BCSC 575; *Re National Credit Counsellors of Canada Inc.* [2003] BCEST #D102/03.

In this case the fundamental issue concerned the allegation by Intech that the overtime worked by Hieb was not authorised. Intech had a full and more than adequate opportunity to present its position to the Director's delegate during the investigation. Likewise, there was ample opportunity to make presentations to the adjudicator. The crucial point in both the determination and the original decision was that Intech knew about the overtime because the hours were paid at "straight time". There was no evidence that Intech refused to pay the hours claimed or directed Hieb not to incur overtime. The records produced by Intech to the delegate confirmed the hours worked and demonstrate that Intech was at least constructively aware of the hours worked.

Although it did not affect the ultimate decision of the adjudicator, there appears to have been a misstatement of principle in the original decision (at page 5) in stating that the *Act* requires the employer to pay overtime when it is worked "*whether it is approved or not*". It bears noting that the Tribunal has held that an employee cannot create a liability for the employer to pay overtime by working hours that are not authorised or knowingly acquiesced in by the employer, *Re: Schutt (cob Abco Building Maintenance)* BCEST #D287/97; applied in *Abco Building Maintenance Ltd.* BCEST #D454/02; see also *Re: McKeen* BCEST #D082/96 and *Re: Egerdeen* BCEST #D080/99. An employer has the inherent right to manage its workforce and to control the hours worked by employees. If, however, overtime is authorised or knowingly acquiesced in by the employer then the legislation requires payment for that overtime but there is no obligation for an employer to pay overtime that is not so authorised, *Small Town Press Ltd.* BCEST #D266/03.

It is clear that Intech was at least constructively aware of the hours worked by Hieb. Therefore, this minor misstatement of principle does not in anyway affect the basic premise of the decision that Intech knowingly allowed the employee to work overtime hours or acquiesced in those hours being worked. Accordingly, Intech was bound to pay the overtime rates as required by the *Act*.

An oral hearing would not or could not have altered the basic premise of the decision that Intech knew of the hours worked as this evidence was provided in the very records produced by Intech to the Director's delegate. There is also no indication by Intech as to how the involvement of legal representation would have significantly altered the outcome of either the determination or the original decision. The publicly available information about proceedings before the Tribunal make it clear that parties are entitled to retain legal representation. I am not satisfied that the failure by Intech to avail itself of such representation in any manner amounts to a breach of the principles of natural justice. The application for reconsideration is dismissed and the original decision is confirmed.

ORDER

The application to reconsider the original decision in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal