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 -

The Director Of Employment Standards
(the "Director")

- of a Determination issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR : David Stevenson

FILE NO.: 98/328 and 98/329

DATE OF DECISION: October 6, 1998

BC EST #D447/98
Reconsideration of BC EST #D527/97 and BC EST #D528/97

DECISION

OVERVIEW

This decision addresses two applications for reconsideration pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*) by the Director of Employment Standards (the "Director") of two decisions of the Employment Standards Tribunal (the "Tribunal"), both dated January 7, 1998 (the "original decisions"). The original decisions considered appeals by Sophie Investments Inc. ("Sophie") from two Determinations made by the Director, both dated July 18, 1997, relating to complaints filed by two former Resident Caretakers of Sophie, Nancy Amery ("Amery") and Shirley Forget ("Forget"), alleging they were not paid minimum wage as prescribed by the *Act*. In those Determinations, the Director, among other things, concluded Sophie had contravened Sections 4, 20 and 21 of the *Act* because it had deducted, without written authorization, the monthly rent obligations, an amount of $320.00 a month, from the wages of Amery and Forget.

The adjudicator in the original decisions disagreed with that conclusion, finding the contract of employment signed by each of the Resident Caretakers could be construed as a written assignment of wages to meet a credit obligation and the deduction of the $320 a month was, by operation of subsection 22(4) of the *Act*, allowed.

The two applications for reconsideration are being considered together as the principal issue in each is the same. The Tribunal has decided, pursuant to its authority under Section 107 of the *Act*, that an oral hearing is not required.

ISSUES TO BE DECIDED

The principal issue is whether the Director has shown a reviewable error in the original decisions in the conclusion that the contracts of employment signed by Amery and Forget represented *"an employee's written assignment of wages to meet a credit obligation"* under subsection 22(4) of the *Act*, thus authorizing, for the purposes of the *Act*, the deduction of a monthly rent obligation from the wages of each employee. A secondary issue, raised in the alternative, is whether the original decision relating to Amery is based on a mistake of fact concerning the apparent presumption of a written assignment under subsection 22(4) before October, 1995.

FACTS

The relevant facts on this reconsideration are found in two passages, one from each of the original decisions:

> Ms. Amery's contract of employment dated October 1, 1995 contains the following clause (underscoring in the original):
>
> **Wages**
> The employee will receive the "Resident Manager Minimum Wage" as defined by the Employment Standard Act [*sic*] of British Columbia.
>
> This wage will consist of:

1) A free suite (Declared for tax purposes at less then [*sic*] the market value.)

2) A monthly fixed pay. The amount of this pay + the declared value of the suite will be equal to the "Resident Manager Minimum Wage" according to the Employment Standards of B.C.

There is also an addendum to the contract which contains the following clause:

> Starting October 1, 1995 the legal minimum wages for the building Parkland House (46 Suites) is $1,192.50.
> The manager will receive: free suite declared at $320.00 / month
> + wage at $872.80 / month
> Total $1192.80 / month
>
> (page 4, BC EST #D527 / 97)

and:

> The circumstances of Ms. Forget's employment are the same as those considered in B.C.E.S.T. No. D527 / 97, as Ms. Forget's written employment contract is identical in its terms to the one considered in that decision, and the nature of her complaint about statutory holiday pay is similar in nature to the complaint in that decision.
> (page 3, BC EST #D528 / 97)

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

116. (1) On application under subsection (2) or on its own motion, the tribunal may

(a) reconsider any order or decision of the tribunal, and

(b) cancel or vary the order or decision or refer the matter back to the original panel.

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

(3) An application may be made only once with respect to the same order or decision.

The circumstances in which an application for reconsideration will be successful are limited. Those circumstances have been identified in several decisions of the Tribunal, commencing with *Zoltan Kiss*, BC EST #D122 / 96, and include:

> failure to comply with the principles of natural justice;
> mistake of law or fact;

significant new evidence that was not reasonably available to the original panel;
inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
misunderstanding or failure to deal with a serious issue; and
clerical error.

Reconsideration is not used simply to provide another opportunity to seek review of the evidence or to reargue a disagreement with the Determination before another panel of the Tribunal.

The Director says the original decisions are reviewable on the grounds that the adjudicator misunderstood a serious issue or, alternatively, made a mistake of law, or mixed fact and law, in the interpretation of the *Act*. The essence of the argument of the Director is that the original decisions failed to appreciate that the manner in which the "wage" of Amery and Forget was formulated was a contravention of Section 20 of the *Act* and as a result, the "deduction" of the rent could not be considered as one authorized under subsection 22(4) of the *Act*. Section 20 of the *Act* reads:

20. An employer must pay all wages

(a) in Canadian currency,

(b) by cheque, draft, money order, payable on demand, drawn on a savings institution, or

(c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

That provision, says the Director, does not contemplate payment of wages "in kind", or in the particular circumstances of these cases, by providing a taxable benefit and including that as part of "wages".

That argument, however, puts the cart before the horse, because it presupposes the real issue taken by the Director with the original decisions, which is whether the contract of employment ought to be read as suggested above, which is that Sophie combined a wage with a taxable benefit to arrive at the minimum wage, or as decided in the original decisions, which was that Sophie paid the minimum wage as required by the *Act*, then deducted an amount equivalent to the value of the suite pursuant to a written assignment of wages to meet a credit obligation provided by Amery and Forget to Sophie. The real issue is simply a disagreement over how the contract of employment should be read. The burden on the Director in this case is to show that the contract of employment is not capable of being read as the adjudicator has read it while still remaining consistent with the requirements, objects and purposes of the *Act*.

I agree with the conclusion in the original decisions that the contracts of employment clearly and unambiguously indicate that Amery and Forget would be paid "Resident Manager Minimum Wage" under the *Act*. I also agree that the manner in which the agreements expressed the wages payable was clumsy, but not fatal. The key aspect of these cases is that the wages were clearly stated to be "Resident Manager Minimum Wage", Amery and Forget received that minimum wage, received annual vacation pay on that wage and were credited with and contributed to the required statutory deductions based on that minimum wage. This is not a situation like that which arose in *Heichman*, BC EST #D184/97, where the value of vaguely estimated accommodation was sought to be added, after the fact, to what was paid to the employee in "cash" to prop up an argument by the employer that the employee had received minimum wage.

I do not agree with the Director that viewing the contracts of employment as written assignments of wages for the purposes of Section 22 is ambiguous. The contracts clearly state an intention to pay minimum wage

less an amount attributable to the rental value of a suite. They are signed by Amery and Forget. One must ask the purpose for the Director demanding Sophie pay to Amery and Forget the value of the suites that both clearly agreed to allow Sophie to recover from wages payable? Section 2 of the *Act* states, in part:

2. The purposes of this Act are to

. . .

(b) promote the fair treatment of employees and employers,

In my opinion, the approach taken by the Director in these applications is overly technical. There is nothing in the submission of the Director to indicate that holding Sophie to the standard sought by the Director would advance any objective of the *Act*. Equally, the Director has not shown that giving effect to the contract of employment as a written assignment of wages to meet a credit obligation would defeat any objective of the *Act*.

I do not agree with the argument of the Director that the original decisions are inconsistent with other decisions of the Tribunal under Section 22. The original decisions found the assignments made by Amery and Forget to be both written and clear in their intent. While acknowledging the assignment could have been clearer, the adjudicator stated, in BC EST #D527/98:

> . . . it is clear to me that the parties understood rent would be paid through a deduction from wages.

The decisions of the Tribunal dealing with issues of whether an employee had made a written assignment of wages under Section 22 of the *Act* have not found that technical perfection is required, only clarity.

The Tribunal has, however, enforced the requirements of the *Act* on issues of whether there has been an assignment of wages under Section 22. The Director asserts an error of fact in the original decision relating to Amery. In its application in respect of Amery the Director submits:

> . . . it should be noted that the employment contract signed by Amery was dated October 1, 1995, hence the earliest there was a written assignment, if that is found to be such, would be October, 1995, about midway through her employment.

That submission did not apply to Forget, as she acquired her employment with Sophie in May, 1996. In its June 22, 1998 reply to the applications for reconsideration, Sophie makes the following comment:

> When in October 1995 I told employees "Let us put on paper what we agreed to verbally a long time ago" nobody objected because there was no change in pay or job description. If I had a procedural mentality I would have added, "Let us back date the contract to your first day of employment and my contract will be "lawyer-proof"".

The above comment is an acknowledgment that before October, 1995 there was no written assignment of wages. While I sympathize with the situation of Sophie, I agree with the following statement found in BC EST #D527/98:

> If Sophie is to succeed on this part of its appeal, it can only be because the deduction of rent from Ms. Amery's wages was a "written assignment of wages to meet a credit obligation".

There was no *written* assignment of wages from the Amery before October, 1995. That fact appears to have been overlooked in the original decision relating to Amery. Subsection 22(4) of the *Act* contemplates a written assignment of wages from the employee is required *before* any deduction can be made. In the absence of a written assignment of wages, such deductions as were made from the wages of Amery in this case are prohibited by application of subsection 21(1) of the *Act*, which reads:

> *21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold deduct or require payment of all or part of an employee's wages for any purpose.*

It follows that the original decision should not have varied the Determination relating to Amery for the period prior to October 1, 1995 and I find the Director has established a reviewable error in that regard.

ORDER

Pursuant to section 116 of the *Act*, I order that the applications for reconsideration succeed in part and the original decision with respect to Amery is varied to show an amount owing of $3204.80, plus 4% annual vacation pay and interest pursuant to Section 88 of the *Act*. In all other respects, I confirm the original decisions.

David Stevenson
Adjudicator
Employment Standards Tribunal