

**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 -

Eileen Carroll Operating as Cynatec  
("Cynatec")

- of a Determination issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 97/709

**DATE OF DECISION:** October 29, 1997

## **DECISION**

### **OVERVIEW**

Pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”), Eileen Carroll operating as Cynatec (“Cynatec”) seeks reconsideration of a decision of the Employment Standards Tribunal (the “Tribunal”), BC EST #D177/97, dated May 3, 1997 (the “original decision”). In that decision the Tribunal confirmed a Determination of the Director of Employment Standards (the “Director”) dated December 13, 1996 which had concluded Cynatec had contravened Sections 16, 17 and 18 of the *Act* and ordered the contravention to cease, ordered compliance and ordered payment of wages and interest in the amount of \$570.31.

### **ISSUE TO BE DECIDED**

The issue in this case is whether the application by Cynatec discloses any grounds upon which the Tribunal would choose to reconsider the original decision.

### **FACTS**

Cynatec employed Robert Lusier (“Lusier”) on June 7, 1996 to work on a commission basis selling products and services on behalf of Cynatec. Lusier quit this employment on July 14, 1996. During his employment he sold no products or services, although he tried to do so. Upon termination he claimed minimum wages were owing for the hours he worked. The Director agreed. Minimum wages were calculated and a Determination was issued for the amount of \$570.31. Cynatec appealed pursuant to Section 112 of the *Act*. The appeal raised three points:

1. Lusier was an agent, not an employee;
2. Lusier worked on a straight commission basis and not on an hourly rate; and
3. The calculation of hours was incorrect.

The adjudicator of the original decision found Lusier to be an employee for the purposes of the *Act*, confirmed that the *Act* requires an employee be paid **at least** the minimum wage prescribed in the Regulations (and I note here, for the benefit of Cynatec, the *Act* gives no effect to any agreement to work for or be paid less than the minimum standards prescribed by the *Act*) and found no reason to alter the calculation of hours made by the Director in the Determination. In its appeal, Cynatec said it would prove the hours of work claimed by Lusier were exaggerated, but apparently failed to do so at the hearing on its appeal.

Cynatec, in its application for reconsideration, says the original decision is disturbing, as Lusier confirmed under oath he had agreed to work for straight commission knowing there was a minimum wage requirement, and that there is evidence Lusier did not work the hours claimed.

## **ANALYSIS**

Section 116 of the *Act* states:

116. (1) On an 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.

It is now firmly established that the above provision will not be interpreted by the Tribunal as allowing any dissatisfied party an automatic right of review. To the contrary, the Tribunal has stated the reconsideration provision will be used sparingly and has identified a number of grounds upon which the Tribunal may choose to reconsider an order or decision. These grounds may be summarized as follows:

- a failure to comply with the rules of natural justice;
- a significant error of fact that is either clear on the face of the record or that arises from the introduction of new evidence that is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the party seeking to introduce it;
- clerical or technical errors; and
- a fundamental error of law or an inconsistency with other Tribunal decisions not distinguishable on their facts.

Cynatec has not established any of the grounds upon which the Tribunal may choose to reconsider the original decision are present.

**BC EST #D485/95**  
**Reconsideration of BC EST #D177/97**

The evidence, which Cynatec says demonstrates an error in the calculation of hours worked by Lusier in the Determination and confirmed in the original decision, was available at the time of the hearing. It was a point Cynatec raised in the appeal. Their failure to follow through on that point when given an opportunity to do so in the hearing does not justify a further review of that area of disagreement with the Determination.

Also, the acknowledgment of Lusier that he had agreed to work for straight commission and that he was aware of the minimum wage requirement does not establish a ground for review. There was no error made by the adjudicator in giving no effect to such an agreement. Section 4 of the *Act* dictates that result and Lusier having knowledge of the minimum wage requirement would not change it.

The application for reconsideration is dismissed.

**ORDER**

Pursuant to subsection 116(1) of the *Act*, the Tribunal chooses not to reconsider the original decision. It is confirmed in its entirety.

**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**