Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Shell Canada Products Limited Produits Shell Limitée
("Shell")

- 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: David B. Stevenson, Panel Chair
Norma Edelman
Kenneth Wm. Thornicroft

FILE No.: 2001/390

DATE OF DECISION: September 13, 2001

DECISION

OVERVIEW

Shell Canada Products Limited Produits Shell Limitée ("Shell") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D096/01, dated February 27, 2001 ("the original decision") which varied a Determination dated September 28, 2000. Shell says the original decision contains serious errors of law in the interpretation of the definition of "wages" as set out in Section 1 of the *Act*, specifically that the original decision was wrong to have concluded a bonus, described in the original decision as the Results Pay bonus, was wages under the *Act*.

This application for reconsideration has been filed in a timely way.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the issue raised is whether the original decision correctly concluded that the Results Pay bonus met the definition of "wages" in Section 1 of the *Act*.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

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.

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection

2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment must also be made of the merits of the Adjudicator's decision. In *Milan Holdings Ltd.*, the Tribunal stated:

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in a previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96) . . .

This is clearly an appropriate case for the exercise of the reconsideration power. The application raises a serious issue of law under the *Act* that should be reviewed concerning the application of the definition of "wages" under the *Act* to incentive based remuneration.

FACTS

The facts relevant to this application are not in dispute.

Shell owns and operates certain retail fuel service stations in British Columbia. The complainant, Lu Verticchio ("Verticchio"), was a salaried employee of Shell as its Northern British Columbia Territory Manager for approximately three years. Verticchio voluntarily resigned his employment with Shell effective December 31, 1999.

While employed, Verticchio was paid on what was identified in the material as a BasePlus pay system. In a Shell document provided to Verticchio, and to other eligible employees, the BasePlus pay system was described as follows:

THE BASEPLUS PAY SYSTEM

As its name suggests, there are two parts to the BasePlus System: your Base Pay and some additional pay called Results Pay. Base Pay is the regular earnings for salaried employees. Base Pay is determined by the marketplace and individual competence in a job. Results Pay is awarded over and above Base Pay. It is an annual, one-time payment that does not increase your Base Pay. Results Pay is not included in the calculation of pension and other benefits. Results Pay depends on the financial performance of the Company and your business unit. The Company has established a five-year business plan to achieve a specific financial result - a 12% return on net investment (RONI) by 1999. Results Pay is funded from a pool of money created when the Company achieves at least 75% of its target RONI. The pool is expressed as a percentage of total Base Pay. Your business unit's Results Pay pool for a given year depends on how well both your business unit and the Company as a whole did in comparison to their business plans. There is also a part of the pool set aside for special awards to individuals who demonstrate outstanding performance during the year.

BASEPLUS	=	**BASE PAY** Linked to the Competitive Market	+	**RESULTS PAY** Linked to Financial Performance and Personal Performance

When he resigned, Verticchio was told by representatives of Shell that he would not be entitled to any Results Pay should the financial target triggering Results Pay be reached. In that respect, the original decision made the following finding of fact concerning entitlement to Results Pay:

> The Employer's literature clearly indicates that, in the event of a voluntary resignation, Results Pay is "excluded" and on "Voluntary Resignations/Retirements . . . Employees must be actively at work when Results Pay is paid to be eligible."

The original decision was not specific about the extent to which the above qualification to entitlement to Results Pay was a condition of Verticchio's employment. The original decision stated:

> The Employee did not deny knowledge of the requirement that he be employed at the time "Results Pay" was paid to be eligible for it. It is not clear whether this pay and bonus system was freely negotiated between the parties before employment commenced or simply unilaterally offered to existing employees purely as an incentive.

> However, for reasons which will become apparent further on, I do not find it necessary to require more information on this point.

The issue considered in the original decision was stated as follows:

> Was the "Results Pay" earned and payable such that it became wages as defined by the *Act*?

The original decision examined that issue from two perspectives. First, it considered whether Results Pay came within the definition of wages in the *Act*, because it was properly characterized as an *"incentive and relates to hours of work, productivity or efficiency"*, and found it was. Second, the original decision considered when Results Pay became wages for the purposes of the *Act* and concluded it became wages when the performance criteria, which was described as "contributing to the company's productivity and efficiency (achieving RONI)" throughout the year, had been achieved. In result, the original decision concluded:

> I find that the Employee clearly earned this bonus in that he worked for the entire period for which the bonus was calculated and, presumably, contributed to the Employer realizing its performance criteria by achieving at least 75% of its target return on net investment ("RONI"). I also find that when the Employee terminated his employment, Section 18(2) of the *Act* accelerated his entitlement to achieve that bonus.

The original decision found that once the Results Pay became wages, Section 4, which states the minimum requirements of the *Act* cannot be waived, applied to any part of the BasePlus pay system that had the effect of terminating Shell's obligation to pay the incentive.

ARGUMENT AND ANALYSIS

Section 1 of the *Act* defines wages to include:

> *(a) salaries, commissions or money, paid or payable by an employer to an employee for work,*
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency, . . .*

Shell submits the definition in paragraph (b) has three components, or prerequisites, to a finding that money paid is wages for the purposes of the *Act*: first, that the money is paid or payable; second that it be paid or payable as an incentive; and third that it relates to hours of work, production or efficiency. Shell submits that only the last two of those components were addressed in the original decision, completely ignoring the requirement that in order to satisfy the definition of wages the money must be *"paid or payable by an employer"*.

We do not agree that the original decision completely ignored whether Results Pay was *"paid or payable"*. In our view, the original decision addressed whether the Results Pay was *"payable"* in deciding it was earned. Nor do we disagree with the general proposition implicit in the original decision that money which is earned by an employee from his or her employment becomes *"payable"* for the purposes of the *Act* when it is earned. In *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST #D376/96, the Tribunal expressed this proposition in the context of commissioned sales persons:

> As a matter of law, the *Act* identifies wages in the context of work performed by an employee. Simply put, wages are earned when work is performed. The Act, with minor exceptions, requires wages to be paid relative to the time they are earned. Section 17 requires an employer to pay its employees at least semi monthly and within 8 days of the end of a pay period all wages earned by the employee in the pay period. The only exceptions to this requirement are banked overtime wages, banked statutory holiday pay and vacation pay. Commissions are not an exception to this statutory requirement. As a matter of law, this requirement would compel an employer to pay all commissions earned by employees in the pay period in which they are earned. I understand as a matter of practice, in certain circumstances, the director relaxes this legal requirement for commissioned employees, provided those employees are paid some wages semi monthly, the wages received represent at least minimum wage for all hours worked in the pay period and it is a term of the employment contract to allow deferral of earned commission to a subsequent pay period. This decision is not intended to interfere with that practice, which is eminently sensible in the context of commissioned employees. However, this practice does not change the legal conclusion that the Act says wages, which includes commissions, become payable, unless their payment is conditional upon some future event, when they are earned.

In the alternative, Shell submits that even if the definition of wages under the *Act* includes a consideration of whether money is earned, the original decision erred in concluding Results Pay had been earned by Verticchio. Shell argues that Results Pay should not have been considered "earned" because Verticchio had not satisfied the eligibility requirements of the program. Shell points out that Verticchio was aware of the eligibility requirements for Results Pay, and, more to the point, he was aware of the requirement to be an active employee of Shell when Results Pay was paid. Shell relies on the Tribunal's decisions in *Re Cascadia Technologies Ltd.*, BC EST #D010/97 and *Re Kocis*, BC EST #D331/98 (Reconsideration of BC EST #D114/98) for the proposition that an employer and employee may agree to preconditions governing the payment of money by the employer to the employee and if such preconditions are not satisfied, such money does not become wages within the definition set out in the *Act*.

Shell raises a concern that the original decision has resulted in a change to the BasePlus Pay system by effectively eliminating one of the eligibility requirements for Results Pay. We do not share that concern. If the original decision was correct in its finding that aspects of the BasePlus pay system were inconsistent with the requirements of the *Act* and were thus proscribed by Section 4, the result would, as a matter of law, be dictated by the *Act*. In that respect, the question is whether there was any basis for applying the prohibition in Section 4 to the BasePlus pay system. We shall return to this point later.

The Director's submission on the reconsideration application essentially supports the position taken by Shell. While the Director agrees with the conclusion in the original decision that Results Pay was an incentive relating to production or efficiency, the Director says that the Results Pay did not, in the circumstances of this case, constitute wages under the *Act* because it was not earned and thus never became *"payable"*. The Director, like Shell, says Results Pay was not earned by Verticchio because he did not satisfy one of the preconditions for entitlement to it. In that context, the Director submits there is no specific or general prohibition in the *Act* against an employer and an employee agreeing to conditions that governs when or whether incentive based remuneration becomes payable.

In his response to the application, Verticchio argues the decision of the original panel was well grounded in law and common sense. He says the Tribunal decisions relied on by Shell, *Re Cascadia Technologies Ltd.* and *Re Kocis*, are irrelevant to the issue raised on reconsideration because those cases dealt with situations where the performance targets that would have triggered the bonus were not achieved. He says neither case considered whether a requirement to be employed at the time the bonus was paid was a "waiver" and was caught by Section 4 the *Act*.

We agree with the position of Shell and the Director that the original decision was wrong, in the circumstances of this case, in concluding Results Pay was either earned or payable. The reasoning found in *Re Cascadia Technologies Ltd.* and *Re Kocis* is relevant and applicable to our conclusion. In *Re Kocis*, the Tribunal stated:

> The Act does not define when a commission is earned. The relationship between employee and employer is one of contract, and the effect of the Act is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract.

The legislature has not seen fit to grant the Director a roving mandate to regulate private employment contracts that in all respects satisfy the minimum statutory requirements of the *Act*. The authority of the Director is limited to enforcing such agreements. The Tribunal has also accepted that parties are free to arrange their relationship as they choose provided the terms of a private employment contract do not contravene the requirements of the *Act* and are

otherwise consistent with the objectives and purposes of the legislation. We can find no prohibition in the *Act* against employers and employees agreeing, *simpliciter*, to conditions for the payment of incentive based remuneration. In fact, as the Director has noted, on one level such agreements are entirely consistent with the stated purposes of the *Act*, found in Section 2, to encourage open communication between employers and employees and to encourage continued employment.

In regard to the latter point, we note the submission of Linda M. Howey, Senior Solicitor for Shell in the appeal, that:

> . . . only those individuals who are employed by the company and actively at work on the date of the payout can be eligible for any reward payment. One of the facets of the reward is to encourage continued employment with Shell.

While nothing legally obliges an employee to remain with an employer, neither is there anything improper with employers designing incentives that encourage continued employment. They are not uncommon, as the Director points out, in the tourism industry. Such incentives help employers reduce costs incurred in the hiring and training of a replacement for an experienced employee. In our view, this aspect of the Results Pay was an equally important consideration as was the productivity and efficiency targets when analysing whether the Results Pay was "earned" and it should have been given effect in deciding whether the bonus was payable in this case.

We also agree with the Director that the real issue in this case is whether the Results Pay was earned and, if it was not earned, that no issue arises about whether there was a contravention of the prohibition found in Section 4 of the *Act* against "contracting out" of the minimum statutory requirements.

We do not find that Shell contravened the *Act* when it refused to pay Verticchio Results Pay. From the material on file, we are satisfied that part of the employment contract between Shell and Verticchio required Verticchio to be actively at work when Results Pay was paid in order to be eligible for it. Simply put, he was not. The failure to satisfy that contractual requirement made him ineligible to receive Results Pay and, having failed to satisfy that requirement, he could not be said to have earned, for the purposes of the *Act*, the incentive based remuneration that is Results Pay.

It is important to note that this is not a case that can be characterized as the employer making a thinly disguised attempt to frustrate Verticchio's right to receive the incentive in question. Nor is this a case where the employer has unlawfully terminated the employee in order to avoid paying a financial incentive that it would otherwise be contractually bound to pay. It is probable that in such circumstances, the Tribunal would be less inclined to give effect to the contractual relationship. In this case, however, Verticchio voluntarily resigned with actual,

or at least, constructive knowledge that by doing so he would lose his entitlement to Results Pay for the current year.

We recognize that Verticchio believes it to have been unfair for Shell to have denied him Results Pay after he resigned, but Shell has done no more than rely on a condition in the agreement he was employed under.

The reconsideration is granted and the original decision is set aside.

ORDER

Pursuant to Section 116 of the *Act*, we order the original decision, BC EST #D096/01, be cancelled and the Determination dated September 28, 2000 be confirmed.

David B. Stevenson **Adjudicator** **Employment Standards Tribunal**	**Norma Edelman** **Adjudicator** **Employment Standards Tribunal**	**Kenneth Wm. Thornicroft** **Adjudicator** **Employment Standards Tribunal**