

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

Anodyne Computer 97 Ltd.
("Anodyne")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

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| ADJUDICATOR: | Alfred C. Kempf |
| FILE NO.: | 98/630 |
| DATE OF DECISION: | December 8, 1998 |

DECISION

OVERVIEW

This is an application by Anodyne under Section 116(2) of the *Employment Standards Act* (the "Act"), for a reconsideration of Decision #D389/98 of the Tribunal dated September 3, 1998.

The decision concluded that Anodyne could not deduct from the wages of Andrew Steinbach ("Steinbach") an alleged overpayment of overtime. It was also determined that there was no overpayment of overtime established by Anodyne.

ISSUES TO BE DECIDED

There are two issues:

Do the circumstances of the case fall into one or more of the grounds upon which the Tribunal will reconsider a decision;

If so, whether the Adjudicator erred in concluding that was no overpayment and that even if there was it was not deductible from "Steinbach's" wages.

FACTS

The facts are set out in the original decision. Some salient facts are summarized below:

Steinbach was dismissed on July 2, 1997 allegedly for cause;

He was a manager;

He was paid some overtime wages over the entire period of his employment. For the first two pay periods he received premium payment for overtime and for the balance of his employment he received "straight time";

Anodyne claimed that it did not know about the payment of such overtime wages. The Tribunal concluded that Anodyne had not satisfied the burden of showing on a balance of probabilities that there was no agreement to pay for overtime hours as had been alleged by Steinbach and accepted by the Director of Employment Standards;

While the employer alleged cause for dismissal that issue was not pursued on the appeal;

The sole issue on the appeal was the liability for overtime pay and whether the employer was entitled to deduct the alleged overpayment of overtime from wages otherwise owing to Steinbach;

Anodyne's appeal seems to be based on the following submissions:

Steinbach as a manager "had some control over the payroll...and was able to direct payment to himself of overtime";

That such payment was "illicit";

That because the payment was illicit (amounting to theft) it is not a wage as defined in the Act;

That Steinbach's conduct was contrary to sections 380 and 398 of the Criminal Code and that therefore deduction is permitted under section 21 of the Act;

It is implicit in Anodyne's submission that it denies any agreement to pay overtime wages as was found by the Tribunal.

ANALYSIS

It has been well established in Tribunal jurisprudence that there is no automatic right of review of Tribunal decisions. The reconsideration provisions will be used sparingly British Columbia (Director of Employment Standards), BC EST #D479/97. While Anodyne's submission does not refer to the established grounds for reconsideration it would seem that the grounds being relied on are roughly stated as:

a significant error of fact that is either clear on the face of the record or relevant previously not reasonably available new evidence; or
a fundamental error of law.

Although the basis for the reconsideration is not entirely clear I am prepared to conclude that a basis for review has been raised.

Significant Error of Fact

Anodyne has not shown that the Tribunal made any significant error of fact. While it is clear that Anodyne disagrees with the decision that there was an agreement to pay overtime it has not shown by new evidence or on the face of the record that the Tribunal made an error of fact. By Anodyne's admission Steinbach only had some control over payroll. This means of course that it had substantial control over payroll. All evidence and circumstances point to an agreement to pay overtime.

Error of Law

Anodyne argues that the Act should be interpreted to allow deductions against wages for claims by employers for alleged criminal conduct. No criminal conduct has been established. To the contrary, it has been concluded that the overtime was paid and received lawfully pursuant to an agreement. It follows that this argument has no application and does not require any further comment.

ORDER

Pursuant to section 116 of the Act, I order that the application for reconsideration be denied and the original decision confirmed.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

ACK/cef
BC EST #D545/98
Reconsideration of BC EST #D389/98