An Application for Reconsideration

\- by -

Douglas Mattson
\- and by -
the Director of Employment Standards
(“Mattson” and the “Director”)

\- 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 Fern Jeffries Kenneth Wm. Thornicroft
FILE No.:	2001/421
DATE OF DECISION:	December 4, 2001

DECISION

OVERVIEW

Douglas Mattson ("Mattson") and the Director of Employment Standards (the "Director") seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D148/01, dated March 27, 2001, (the "original decision") which referred back to the Director a Determination dated October 13, 2000.

The original decision considered an appeal of the Determination by Elaine Salo, operating as Coastal Cleaners ("Coastal Cleaners") and addressed three issues raised in that appeal: whether the Director had wrongly concluded Mattson was an employee of Coastal Cleaners for the purposes of the *Act*, whether the conclusion of the Director of the number of hours actually worked by Mattson was reasonable and whether the method of calculating Mattson's hourly wage rate was proper. The original decision found no error in the conclusion that Mattson was an employee of Coastal Cleaners for the purposes of the *Act* or in the calculation of the number of hours worked by Mattson. The original decision did, however, disagree with the method used to calculate Mattson's regular wage rate and referred that matter back to the Director, together with some comments about what the hourly wage rate should be for Mattson. A later decision, BC EST #D449/01, confirmed the recalculation and varied the Determination to show an amount owing of $1,387.51. The Adjudicator noted that decision was subject to the result of these reconsideration applications.

Mattson says the original decision was wrong and the method used to calculate the hourly wage rate in the Determination was correct. The Director says the original decision contains a serious error in law.

The applications for reconsideration have 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 substantive issue raised is whether the original decision correctly concluded that Mattson's 'regular wage' should be the minimum wage set out in 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*
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> *(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 is also be made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration.

These applications allege the original decision was wrong in its interpretation of the definition of "regular wages" in Section 1 of the *Act* and was wrong in its consideration of the facts relating to Mattson's employment. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal. They include a mistake of law or fact. We must decide whether matters identified by the applicants warrant reconsideration in the context of the Tribunal's approach to reconsideration. If the matters warrant reconsideration, the second stage is a full analysis of the substantive issue or issues raised by the applicants.

FACTS

The background to the complaint is found in the following passage from the Determination:

> Douglas Mattson worked for Coastal Cleaners as a carpet cleaner between 19 November, 1998 and 3 August, 1999. His remuneration was 20% commission on the value of work done (rising to 23% on 1 January, 1999) (10% if the work was shared with a co-worker), plus 25% on "upsell" (work that the complainant sold in addition to the original appointment).

The Determination found, among other things, that Mattson was entitled to overtime pay, minimum daily wages, annual vacation pay and statutory holiday pay. The original decision did not alter those findings.

The original decision confirmed that Mattson was an employee of Coastal Cleaners and that the hours of work calculation done by the Director was not incorrect:

> I am also not satisfied that the delegate made any errors in working out what hours were actually worked by the employee. The delegate applied all of the information with which he was provided by the employer and the employee at the time. It is not open to the employer to now attempt to provide other information or "expert" estimates to contradict those figures. I conclude that the hours worked by the employee should also be confirmed.

The statutory provisions referred to in the original decision that are relevant to these applications are found in Section 1, in the definition of "regular wages" and "wages", and in Section 2(a) and (b) of the *Act*:

> *"**regular wages**" means . . .*
>
> *(b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work in that pay period, . . .*
>
> ...
>
> ***"wages"** includes*
>
> *(a) salaries, commissions or money, paid or payable by an employer to an employee for work, . . .*
>
> . . .

2. The purposes of this Act are to

    (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,

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

This would be an appropriate place to note that the definition of "regular wages" is not a concept that exists in the *Act* independently of the definition of "wages". In *Dusty Investments Ltd. c.o.b. Honda North*, BC EST #D043/99; (Reconsideration of BC EST #D101/98), the Tribunal noted:

> There is no magic in the use of the word "regular" in the definition [of regular wages]. That term exists primarily for the purpose of avoiding confusion between the formula for reaching an hourly wage and the definition of "wages" that appears later in Section 1 (and which is set out above). A "regular wage" is simply a "wage" that has been converted to an hourly rate.

As indicated by the Director in their application submission, the conversion of a 'wage' into "regular wages" is easily calculable by applying one of the formulas set out in the definition; it is a simple exercise in addition and division.

The Adjudicator opined that the definition of "regular wages", applied to a pure commission structure where there is no agreed upon hourly, weekly or monthly wage, there are no required hours of work and the hours of work are not controlled by the employer, would create a result that was unreasonable, inequitable, illogical and incompatible with the stated purposes of the legislation. The Adjudicator provided two reasons for his opinion:

> The irrationality of applying the definition in coming to assess a "regular wage" is that it results in an hourly rate that is never "regular". In this case it results in 18 different hourly rates varying from $8.03 per hour to $13.15 per hour. In fact the irrationality is exacerbated by the situation in which the less the employee works the higher his rate of overtime pay when he does work overtime.

Based on the perceived absurdity of attempting to fit to employees paid on a 'pure' commission basis, where there is no regularity to the wage and no structured hours of work, into the definition of "regular wage", the Adjudicator concluded:

> In my opinion, in the case of pure commission sales, the fair and reasonable interpretation of the purposes and application of the legislature is limited to ensuring that the commission sales person receives at least minimum wage for the hours worked in each pay period. The legislation is also limited to

> ensuring that overtime premiums are based on at least the minimum wage. Therefore in my opinion where there is in fact no regular wage and no hourly work structure in existence attempting to force the pure commission structure into the definition of "regular wage" results in an absurdity and should not be attempted.

In reaching the conclusion he did, the Adjudicator referred to and relied on a principle of statutory interpretation reflected in the following comment of the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

In result, the Adjudicator decided the regular wage for employees paid on a 'pure' commission basis, with no agreed upon hourly, weekly or monthly wage and no hours of work fixed and controlled by the employer, would be the statutory minimum wage. This panel notes that the Adjudicator did not find that the regular wage for Mattson could not be discerned by applying the definition of "regular wages" found in Section 1 of the *Act* to his commission earnings and hours worked, but that applying that definition was "completely illogical", or absurd, in the case of an employee paid on a 'pure' commission basis.

ARGUMENT

Mattson argues that the original decision failed to appreciate, from a factual perspective, that he was not a commission sales person selling a product but was a worker paid on commission to perform a labour intensive service, cleaning and applying Scotchguard to carpets. His commission wage was not based on a percentage of sales, but on the value of the work done. He also says that, contrary to what the Adjudicator concluded, Coastal Carpets did have control of the hours he worked. He points out that was one of the factors that led the Director to conclude he was an employee. As an aside, we do note the Determination concluded that "it is clear that the company expected him to do the work that was assigned to him".

The Director argues that the original decision has ignored the definition of "regular wages" and has wrongly substituted the statutory minimum wage in place of the formula set out in that definition for some employees paid on a commission basis. The Director says the rationale provided in the original decision for departing from an application of the definition

in the circumstances does not withstand scrutiny and there is otherwise no basis for rejecting the definition of "regular wages" for employees paid on a 'pure' commission basis in favour of the statutory minimum wage. The Director submits there is nothing absurd, unfair or illogical with the legislature providing a clear and certain formula for converting various pay schemes to an hourly rate for the purpose of administering the minimum statutory requirements of the *Act*, nor is application of the definition to commissioned sales persons incompatible with the stated purposes and objectives of the *Act*.

The Director submits that the consequence of the interpretation placed on the *Act* in the original decision is totally at odds with the preferred application of benefits-conferring legislation, which is found in the following statement from *Re Rizzo & Rizzo Shoes Ltd.*, *supra*:

> . . . benefits conferring legislation . . . ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

The Director says the effect of the interpretation of what is the regular wage for an employee paid on 'pure' commission is the least beneficial result for the employee.

In our view, the applicants have raised questions of law justifying reconsideration, and while we are of the view there is some merit to Mattson's position on the errors of fact, we prefer to address these applications on the issue of law.

ANALYSIS

The issue of law is one of statutory interpretation, specifically whether the *Act* can be interpreted to allow a conclusion that the "regular wages" for an employee paid on a commission basis, where there is no agreed upon wage structure and no set hours of work, is the minimum wage under the *Act*.

In *Rizzo & Rizzo Shoes Ltd.*, *supra*, the Supreme Court, endorsed a purposive approach to statutory interpretation. At para. 21, the Court said:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The above approach is summarized in Driedger, *The Construction of Statues*, (3rd ed. 1994), in the following propositions, found at page 35:

> (1) All legislation is presumed to have a purpose. It is possible for courts to discover, or to adequately reconstruct, this purpose through interpretation.
>
> (2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of ordinary meaning.
>
> (3) Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.
>
> (4) The ordinary meaning of a provision may be rejected in favour of an interpretation more consistent with the purpose *if the preferred interpretation is one the words are capable of bearing*.
>
> (emphasis added)

The purposive approach directs that the *Act* must be read as a whole, attempting to give meaning to all the words in their entire context in a way that is consistent with the scheme and object of the Act, and the intention embodied in the words. The Tribunal has consistently endorsed and applied this approach in interpreting the *Act*.

This approach, however, does not say that the plain, or ordinary, meaning of the provision in question is irrelevant. As noted above, the purposive approach allows for the ordinary meaning of the words in the provision to be rejected in favour of an interpretation more consistent with the purpose of the statute if the preferred interpretation is one the words are capable of bearing. Deciding if the words convey a plain meaning is a necessary step in the process because ultimately any interpretation given must accord with the plain meaning of the words used. As stated in Sullivan, *Statutory Interpretaion*, (1997):

> Where the ordinary meaning of a provision appears to be clear but conflicts with the legislature's apparent purpose, there is work to be done. An interpretation must be sought that accords with the purpose without imposing too great a strain on the text.

The difficulty this panel has with the original decision is that it is completely at odds with the plain, or ordinary, meaning of the words found in the definition of "regular wages". This panel is at a loss to see how the words found in that definition can be interpreted in a way that would allow the term "regular wages" in paragraph (b) of the definition to be read as "minimum wage" for some employees who are *"paid on a flat rate, piece rate, commission or other incentive basis"*. In our view, the plain meaning of the words found in the *Act* for defining the regular wage for employees paid on a commission basis is not capable of bearing the interpretation placed on them in the original decision. The *Act* directs that the regular wage for employees paid on a commission basis be determined by dividing an employee's total hours of work in a pay period into the wages paid in that pay period. In order for that provision to have the result given in the original decision, the definition would need to be varied to indicate that the regular wage for employees paid on a 'pure' commission basis with no set hourly, weekly or monthly wage rate and whose hours of work are not set and controlled by the employer is minimum wage. Otherwise, the method for determining the "regular wages" of employees paid on a commission basis is clearly stated in the definition and its application according to the plain meaning of the words is unavoidable.

Principles of statutory interpretation are not licence for a Court or Tribunal to ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on that body's judgment about what is 'fair', 'logical' or 'rational', or what 'should be'. In *Office and Professional Employees' International Union, Local 378 -and- British Columbia (Labour Relations Board)*, [2000] B.C.J. No. 1225; [2000] BCSC 939, the Court said, at para. 24:

> However, the permitted ambit of interpretation is not infinite. The Board may not under the guise of interpretation substitute its own policy judgment for that of the Legislature. As the Court of Appeal, in a slightly different context, has stated:
>
> > The fact that the Council and the arbitrator have special expertise with respect to the field of industrial relations does not give them the power to usurp the legislative function. (*cf. BCGEU v. British Columbia (Industrial Relations Council)* (1988), 33 B.C.L.R. (2d) 1 at 23 (B.C.C.A.)).

There was no consideration in the original decision of the plain, or ordinary, meaning of the words found in the definition of "regular wages". That is a necessary, and preliminary, step in the interpretation of a statutory provision. In *Biller v. British Columbia (Securities Commission)*, [2001] B.C.J. 515; [2001] BCCA 208, our Court of Appeal stated:

> The first step in statutory interpretation is to determine if there is a plain meaning of the statutory provision in question. This determination must be made after consideration of the statute as a whole.

We know the adjudicator found the result of the strict application of the definition of "regular wage", to the circumstances as he perceived them, to be "unreasonable, inequitable, illogical and incompatible" with the stated purposes of the *Act*, but we are quite unaware of whether the Adjudicator believed the provision spoke clearly to a plain meaning and, if so, how the preferred interpretation could be imposed on the legislation without placing too great a strain on the language. However, it is insufficient to say the legislation does not apply logically. It is also necessary to justify the interpretation given on a reading of the statute as a whole and what the words can reasonably bear.

From the perspective of the *Act* as a whole, the logical implication of the original decision is that the legislature intended that some, but not all, employees paid on a commission basis have their entitlement under the *Act* to minimum daily hours, overtime pay, pay for work on a statutory holiday[1] and length of service compensation calculated at minimum wage. In our view that view is not supported on a reading of the *Act* as a whole. We digress momentarily to comment on the statement in the original decision that:

> . . . the definition in the *Act* of **"regular wage"** . . . is used in calculating overtime, statutory holiday pay and vacation pay . . .

That is not a correct statement. The "regular wage" is not used to calculate either statutory holiday or annual vacation entitlement under the *Act*. The former is calculated on actual wages earned in the 30 days preceding the statutory holiday and the latter is calculated as a percentage of wages earned. That, in itself, leads to the anomaly of an employee paid on 'pure' commission having some statutory entitlements calculated on actual earnings, while other entitlements are calculated on minimum wage. It also undermines the conclusion of the Tribunal that a 'pure' commission wage system is not inconsistent with the administrative scheme of the *Act* (see *Wen-Di Interiors Ltd.*, BC EST #D481/99).

When the *Act* is looked at as a whole, it is apparent that a determination of an employee's regular wage is an essential component of the administrative scheme. We reiterate that the primary purpose of including a definition of "regular wages" is to provide a formula for converting an employees actual "wages" to an hourly rate for ease of administering several provisions in the *Act* and we agree with the Director that the calculation of the "regular wages" of an employee is a simple exercise in addition and division. Having a provision that allows for a clear and consistent application of the scheme of the *Act* is in accord with the statutory objective of ensuring fair and expeditious resolution of claims. Based on that purpose, we can only conclude that the legislature intended the "regular wages" of all employees would be a reflection of, and would bear some direct relationship to, their actual

[1] One of the effects of the original decision is that an employee's premium pay for hours worked on a statutory holiday would be calculated at minimum wage even though the same employee's statutory holiday pay entitlement for the same would be calculated on actual wages earned in the 30 day period preceding the statutory holiday.

"wages". Suggesting that an interpretation of the *Act* which results in the "regular wages" for some employees paid on commission basis being the minimum wage is supported by Section 2(a) and (b) of the *Act* does not give proper effect to the statutory objective conveyed in the words of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1003, that:

> ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

Surely, excluding a class of employee, those on 'pure' commission with no set wage or fixed hours of work, from premium entitlement calculated according to the clearly described formulas found in the definition of "regular wages", is not consistent with the above direction, as the discussion below illustrates.

The objectives of the legislature in establishing premiums for employees required to work overtime or statutory holidays was twofold: to compensate employees for the inconvenience of having to work during what would otherwise be their leisure and family time and to discourage employers from creating that inconvenience. The interpretation provided in the original decision clearly frustrates the latter objective if overtime and statutory holiday premiums for commission sales persons who are actually earning well in excess of the minimum wage payable only at the minimum wage. In this case, for example, the calculations done by the Director produced an hourly rate for Mattson as high as $13.15 per hour. The Determination found that Mattson's hours were effectively determined by the work assigned to him by the employer. One has to ask whether there is any disincentive to having Mattson work premium (overtime and statutory holiday) hours when the cost to the employer, at 1½ times the minimum wage would, in fact, be less than his converted hourly rate of $13.15 an hour. Evening applying the double time premium on the minimum wage results in a cost that is only marginally more than his hourly rate during that period. The unfairness to the class of employee caught by the original decision only accelerates as the actual wage of the 'pure' commission employee increases.

In reaching his conclusion to declare the "regular wage" for Mattson to be the statutory minimum wage, the Adjudicator found that an application of the "regular wage" as calculated by the Director was illogical, and therefore an absurdity, because the resulting hourly rate was never "regular", but varied from pay period to pay period. The problem with that rationale is that the result which creates the "absurdity" is not unique to persons employed on a 'pure' commission basis. It can equally apply to persons paid on any incentive basis and can even be applied to employees who work on a fixed salary but work different hours in each pay period. There is nothing in the definition of "regular wages" or "wages" indicating an employee's wage must be consistent from pay period to pay period.

The original decision will be set aside.

We have also reviewed the Determination and the material on file in the appeal and find there was no basis for concluding the calculation done by the Director of the amounts owed was incorrect. The appeal on that point had no merit and should have been dismissed. Mattson and the Director say the Determination should be confirmed. We agree.

We will address one final matter. While it is not referred to in the original decision, the argument of the Director indicated that in *Can Com Electronics Ltd.*, BC EST #RD135/01 (Reconsideration of BC EST #D334/00), a panel of the Tribunal, consisting of the same Adjudicator as in the original decision, had similarly substituted the statutory minimum wage for the hourly rate of pay calculated according to the definition of "regular wages" in Section 1 of the *Act* for a commission sales person. We have reviewed that decision and, for the reasons set out in this decision, find it was wrongly decided. It will not be given effect by the Tribunal.

ORDER

Pursuant to Section 116 of the *Act*, this panel orders that the original decision be cancelled, the appeal of Coastal Cleaners be dismissed and the Determination dated October 13, 2000 be confirmed, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson **Adjudicator, Panel Chair** **Employment Standards Tribunal**	**Fern Jeffries** **Chair** **Employment Standards Tribunal**	**Kenneth Wm. Thornicroft** **Adjudicator** **Employment Standards Tribunal**