

An Application for Reconsideration

- by -

Andrew (Andy) Mollica

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE NO.: 2018A/37

DATE OF DECISION: April 24, 2018

DECISION

SUBMISSIONS

Andrew (Andy) Mollica on his own behalf as a Director and Officer of Anducci's Restaurant (Hastings) Ltd.

OVERVIEW

1. This is an application by Andrew Mollica, a Director and Officer of Anducci's Restaurant (Hastings) Ltd. ("Anducci's"), for a reconsideration of 2018 BCEST 25 (the "Original Decision"), issued by the Tribunal on March 19, 2018.
2. In 2008, four former employees of Anducci's filed complaints with the Employment Standards Branch alleging that they had not been paid wages. Following an investigation, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") concluded that Anducci's had contravened the *Employment Standards Act* (the "ESA") in failing to pay wages to the employees. In the Determination, issued April 8, 2009 (the "Corporate Determination"), the Director ordered Anducci's to pay wages and interest in the total amount of \$5,955.23.
3. The Corporate Determination was sent to Anducci's as well as to Anducci's sole Officer and Director, Mr. Mollica.
4. Mr. Mollica appealed the Corporate Determination to the Tribunal on behalf of Anducci's contending that the Director erred in law and failed to observe the principles of natural justice in making the Corporate Determination. The Tribunal dismissed the appeal, concluding that Mr. Mollica had not demonstrated either an error of law or a failure to observe natural justice. (see *Anducci's Restaurant (Hastings) Ltd.*, BC EST # D078/09)
5. In a Determination issued November 17, 2017 (the "Director Determination"), the Director found that Anducci's had not paid the outstanding wages and that Mr. Mollica was the sole Director or Officer of Anducci's at the time the wages were earned and should have been paid. The Director's delegate determined that Mr. Mollica was personally liable for up to two months' wages for each of the employees, in the total amount of \$7,351.10 including interest.
6. Mr. Mollica appealed the Director Determination on November 23, 2017. In its March 19, 2018, decision, Tribunal Member Pearce dismissed the appeal, noting that Mr. Mollica had not provided any grounds for an appeal, and as such, she was unable to assess the merits of the appeal. The Tribunal Member also determined that Mr. Mollica had not demonstrated any error in the Determination.
7. Mr. Mollica now seeks reconsideration of the Original Decision, arguing that he is not liable for the outstanding wages.

ISSUE

8. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENT

9. In his two page reconsideration request, Mr. Mollica asks why a decision had been made “without having a chance to speak with someone.” Mr. Mollica’s submission, which is somewhat difficult to follow, says, among other things, that Anducci’s had 6 locations, 5 of which were franchised; that the main location was destroyed by fire in 2010; that he believes there was a mix-up between the locations; and that he had a conversation with a delegate about the employees and that “nothing came of it.” Mr. Mollica says that because of the fire, he is unable to provide any documentation regarding the corporate structure.

THE FACTS AND ANALYSIS

10. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 of the *ESA* provides
 - (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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

1. The Threshold Test

11. The Tribunal reconsiders a decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
12. In *The Director of Employment Standards (re Milan Holdings Inc.)* (BC EST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
13. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
 - The Member fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;

- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(Zoltan Kiss, BC EST # D122/96)

14. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process is not meant to allow parties another opportunity to re-argue their case.
15. After weighing these and other factors, the Tribunal may determine that an application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in an application is appropriate for reconsideration, the Tribunal will then reconsider the matter. The focus of the Tribunal on reconsideration will in general be with the correctness of the decision being reconsidered.
16. In *The Director of Employment Standards (re Giovanni (John) Valoroso and Carmen Valoroso operating as Primadonna Ristorance Italiano)* (BC EST # RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:
- .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...
17. There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” is not deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.
18. Mr. Mollica’s reconsideration request is essentially a restatement of the statements he made to the Tribunal in his November 23, 2017, appeal. In his appeal documents, although Mr. Mollica conceded that he was a Director of Anducci’s at the time the wages were earned, he stated he was “unaware that any employee issue was still outstanding.” He also said that he disagreed with the amount set out in the Determination. In his appeal letter, Mr. Mollica says “please advise my next steps.”
19. In her March 19, 2018, decision, the Tribunal Member found that, despite requests from the Tribunal, Mr. Mollica had not identified any grounds for the appeal. The Tribunal Member noted that, in response to Mr. Mollica’s request for advice, the Tribunal wrote to Mr. Mollica seeking further information, including the grounds for the appeal and supporting written reasons for the request. The Tribunal’s correspondence asked Mr. Mollica to provide that information by December 27, 2017, and that if no additional information

was obtained, the Tribunal would decide the matter based on the incomplete documentation provided on November 23, 2017. Mr. Mollica did not submit any additional information. The Tribunal Member dismissed the appeal, concluding that not only had Mr. Mollica not identified any discernable grounds of appeal, he had not demonstrated that there was an error in the Determination.

20. The Tribunal has often noted that, given the purposes and provisions of the legislation, it is inappropriate to take an “overly legalistic and technical approach” to the appeal document: “The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned.” (*JC Creations*, BC EST # RD317/03). While the Tribunal Member appears to have taken an overly technical approach to the appeal in dismissing it primarily because Mr. Mollica did not identify a ground of appeal, she also noted that Mr. Mollica had not demonstrated that there was any basis to interfere with the Determination. I find no reason to interfere with that conclusion based on any of the factors identified by *Zoltan Kiss, supra*.
21. Mr. Mollica’s appeal of the Corporate Determination against Anducci’s was unsuccessful. Given that Mr. Mollica agrees he was a Director of Anducci’s during the period when the outstanding wages were earned and ought to have been paid and that he was aware of his personal liability for unpaid wages, the information he provided on appeal was irrelevant to an assessment of his personal liability.
22. Mr. Mollica’s application is not appropriate for reconsideration. As noted above, the reconsideration process is not meant to allow parties another opportunity to re-argue their case. Mr. Mollica’s request does not raise any questions of law, fact, principle or procedure that were not fully and properly addressed by the Tribunal Member in the Original Decision.
23. The application is denied.

ORDER

24. Pursuant to subsection 116(1)(b) of the *ESA*, the decision of Tribunal Member Pearce issued in 2018 BCEST 25 is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal