

An application for Reconsideration

- by -

Robert Compston

- 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-Ann Hart

FILE No.: 2005A/189

DATE OF DECISION: January 12, 2006

DECISION

SUBMISSIONS

Robert Compston	on his own behalf
Lana Richardson	on behalf of 369266 B.C. Ltd., operating as Troll's Restaurant
Lynn Ranger	on behalf of the Director

THE APPLICATION

1. This is an application filed by Robert Compston for reconsideration pursuant to section 116 of the *Employment Standards Act* (the "*Act*") of Tribunal decision BC EST #159/05 dated October 17, 2005 (the "Decision").
2. The application is brought on the grounds that the Tribunal erred in law in making the Decision.

ISSUE

3. The following issues are raised by this application:
 1. Are there grounds for the Tribunal to reconsider the Decision?
 2. If it is determined that this is an appropriate case for reconsideration, did the Tribunal err in making the Decision?

BACKGROUND

4. On February 20, 2004 Mr. Compston was hired as a cook by 369266 B.C. Ltd. operating as Trolls Restaurant ("Trolls"). He was promoted to the position of assistant manager on March 20, 2004. On July 5, 2004, Mr. Compston's employment was terminated. Mr. Compston filed a complaint with the Employment Standards Branch on July 23, 2004, in which he maintained that he was owed wages, vacation pay, and compensation for length of service by Trolls.
5. Trolls again hired Mr. Compston as a cook on March 25, 2005, but terminated his employment shortly thereafter on March 28, 2005. A second complaint was then filed by Mr. Compston in which he alleged that Trolls had contravened section 67(b) of the *Act* (which provides that a notice given to an employee under Part 8 of the *Act* has no effect if the employment continues after the notice period ends) and owed him wages from the date his employment was first terminated until the second date on which Trolls terminated his employment. Mr. Compston did not dispute that before the Determination was made by the delegate for the Director, he had received all regular wages, vacation pay, and compensation for length of service from his first period of employment with Trolls.
6. The delegate for the Director conducted a hearing, and issued a Determination dated August 8, 2005 (the "Determination") dismissing the complaints filed by Mr. Compston. The delegate for the Director found

that Mr. Compston's employment was not continuous between the first and second periods of employment, and Trolls had not contravened section 67(b) of the *Act*.

THE MEMBER'S DECISION

7. Robert Compston then filed an appeal of the Determination with the Employment Standards Tribunal. The appeal was filed on the grounds that the delegate for the Director had erred in law and had failed to observe the principles of natural justice in making the Determination.
8. The Member who decided the appeal found that there was no merit to the allegation that the delegate for the Director had erred in law. Mr. Compston had provided no evidence to the delegate for the Director or to the Tribunal on appeal to support his assertion that his employment should be deemed to be continuous between July 2004 and March 2005. The Member further noted that it appeared from Mr. Compston's submissions that he was employed at another restaurant for some time after July 2004.
9. The Member found that when the employment of Mr. Compston was terminated in July 2004, Trolls paid him compensation for length of service. As a result, the issue of whether his employment was wrongfully terminated was not relevant.
10. The Member further decided that the allegation that the delegate for the Director had failed to observe the principles of natural justice in making the Determination was also without merit.

ANALYSIS

11. The Tribunal's reconsideration power is found in section 116 of the *Act* which reads, in part, as follows:

Reconsideration of orders and decisions

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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

12. In an application for reconsideration, the onus of proving that the Tribunal erred in making the Decision rests with the applicant.
13. In *Milan Holdings Ltd.*, BC EST # D313/98 (Reconsideration of BC EST #D559/97) the Tribunal concluded that a two-stage approach should be taken with respect to applications for reconsideration. Before considering the merits of the application for reconsideration, the Tribunal must be satisfied that the issues raised in the reconsideration request are very important in the context of the *Act*, and warrant further inquiry.
14. In *Zoltan Kiss*, BC EST # D122/96, the Tribunal set out a non-exhaustive list of the possible grounds for reconsidering a decision:
 - a failure by the Adjudicator to comply with the principles of natural justice;
 - there is some mistake in stating the facts;

- a failure to be consistent with other decisions which are not distinguishable on the facts;
 - some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
 - some serious mistake in applying the law;
 - some misunderstandings of or a failure to deal with a significant issue in the appeal; and
 - some clerical error exists in the decision.
15. In *Robbie Gabrysh*, BC EST # RD103/05 (Reconsideration of BC EST # D044/05) the purpose of the reconsideration power was summarized as follows:
- The reconsideration power must be used sparingly and only where important issues are raised (see *Re Valoroso*, BC EST #RD046/01). If it were otherwise, the appeal process would be undermined and every unsuccessful party at the appeal stage would make a request for reconsideration. The reconsideration power is designed to be used only where an important issue has arisen which the Tribunal accepts ought to be subjected to careful reconsideration.
16. In some of his other submissions, Mr. Compston appeared to be re-arguing the matters he had raised with the delegate for the Director or on appeal. The Tribunal has held in previous decisions that the reconsideration process will not be used to allow for a “re-weighing” of evidence or the seeking of a “second opinion” when a party simply does not agree with the original decision. (See *Khalsa Diwan Society*, BC EST # D199/96 and *B and C List (1982) Ltd.* BC EST # RD154/05 (Reconsideration of BC EST # D042/05)).
17. Other information and arguments put forward by Mr. Compston do not appear to be relevant to this application for reconsideration, and I have therefore not considered them further.
18. Mr. Compston wrote in his letter dated October 27, 2005 which was attached to his Reconsideration Application Form that the Tribunal had not considered his employment history with “another company of the group of companys (sic) of the restaurant business; Pemberton Station Pub”. I have reproduced below part of Mr. Compston’s submissions exactly as written:
- Although the Pemberton Station Pub is not named for a violation of business record requirement of company, I believe as this store is a part of a function of the group of companys (sic.), this period of employment and hours worked should be considered a part of the entire employment period of the whole and complete company, I am not responsible for the companys (sic.) tax procedures, so I do not believe a distinct separation of the employment can be met, of these two companmys (sic.), under the shelter of the accused parent company or otherwise, of a group of companys (sic.).
19. Mr. Compston failed to raise this issue with the delegate for the Director or the Tribunal Member on appeal. The Tribunal has determined that a reconsideration will not be undertaken where an applicant raises issues which were not raised before the Tribunal on appeal. (See *Fairwinds National Boating Inc.*, BC EST #RD011/03 and *Re Paradigm Management (B.C.) Ltd.*, BC EST #RD116/03). There was no explanation as to why Mr. Compston had failed to raise the argument in the previous proceedings. I decline to consider this new issue raised by the applicant on reconsideration.

20. I am unable to conclude that the Member erred in finding that the delegate for the Director had not erred in law, or had failed to observe the principles of natural justice in making the Determination. The Tribunal will not exercise its discretion to reconsider the Decision.

ORDER

21. The application for reconsideration is dismissed, and pursuant to Section 116 of the *Act*, the decision of the Member is confirmed

Carol-Ann Hart
Member
Employment Standards Tribunal