An application for Reconsideration

- by -

The French Room Art De Coiffures Ltd. carrying on business as
Richard Jeha Hair Company

- 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: Robert Groves

FILE No.: 2006A/141

DATE OF DECISION: March 7, 2007

DECISION

SUBMISSIONS

Richard Jeha	on behalf of the Employer
Rubyrose Alcalde	on her own behalf
Ian MacNeill	on behalf of the Director

OVERVIEW

1. This is an application brought by the French Room Art De Coiffures Ltd. carrying on business as Richard Jeha Hair Company (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") seeking reconsideration of a decision of a Member of the Tribunal dated December 5, 2006 under #D118/06 (the "Original Decision").

2. The matter came before the Member by way of an appeal filed by the Employer pursuant to section 112 of the *Act* in which the Employer challenged a determination of a delegate of the Director of Employment Standards (the "Delegate") dated August 16, 2006 (the "Determination"). In that Determination the Delegate found that an employee of the Employer's, one Rubyrose Alcalde ("Ms. Alcalde"), was entitled to the sum of $2,301.14 in respect of several contraventions of the *Act* relating to payroll records, annual vacation pay, statutory holiday pay, and unauthorized deductions, together with interest. The Delegate also ordered the Employer to pay $2,500.00 in administrative penalties, with the result that a total of $4,801.14 was found to be owed.

3. In the Original Decision, the Member ordered that the Determination be confirmed.

4. I have before me the contents of the Tribunal file relating to the Employer's original appeal, the Original Decision, and the submissions of the Employer, the Delegate, and Ms. Alcalde on this application for reconsideration.

5. There is no issue as to the timeliness of the application for reconsideration.

FACTS

6. The Employer operates a hair salon in Vancouver. Ms. Alcalde was employed there as a stylist from October 2001 until January 2006, at which time she resigned. When she received her final paycheque Ms. Alcalde observed that the sum of $1,000.00 had been deducted without her written authorization.

7. Ms. Alcalde filed a complaint under section 74 of the *Act* in respect of the deduction, and the Employer's alleged failure to provide statutory holiday pay as required.

8. During the course of the Delegate's investigation, and at a hearing conducted by the Delegate on August 2, 2006, the representative of the Employer, Richard Jeha ("Mr. Jeha"), asserted that he and Ms. Alcalde had agreed at the time of her hire that she would not be paid statutory holiday pay and that she would be

obliged to reimburse the Employer for expenses incurred in sending her to hair competitions, which reimbursement would be collected by means of deductions from her paycheques. The $1,000.00 deducted from Ms. Alcalde's final cheque represented a partial reimbursement to the Employer for expenses still said to be owed by Ms. Alcalde for a competition she had attended in Milan, Italy, in 2004.

9. The evidence before the Delegate revealed that deductions for such expenses, and for the cost of cosmetic surgery Ms. Alcalde had received and which the Employer had financed, had been made from Ms. Alcalde's paycheques in the past. In submissions made to the Delegate, Mr. Jeha stated that this history demonstrated Ms. Alcalde's consent to the deductions, at least by inference, and a precedent justifying the Employer's deducting some of the costs relating to the Milan trip from Ms. Alcalde's final paycheque. Mr. Jeha acknowledged, however, that he had never obtained a written authorization from Ms. Alcalde that the Employer could deduct these sums in this way.

10. Ms. Alcalde had no recollection of the agreement relating to statutory holiday pay. She was also firm that she had told Mr. Jeha she would not go to the Milan function if she had to pay for it herself. The Delegate's Reasons state that Mr. Jeha acknowledged she had said that.

11. Given that the Employer acknowledged it had not paid Ms. Alcalde statutory holiday pay, and that it had not obtained her written authorization to deduct the expenses from her paycheques in the form of a written assignment contemplated by section 22(4) of the *Act*, the Delegate concluded that the contraventions of which Mr. Alcalde had complained were made out, on the evidence.

12. The Delegate dismissed as legally untenable the Employer's assertion that it should be exempted from the application of the provisions of the *Act* because Ms. Alcalde had consented to the Employer's actions. On this point, the Delegate referred to section 4 of the *Act*, which declares of no effect agreements between employers and employees to waive any of the minimum requirements of the legislation. Thus, even if it could be said that Ms. Alcalde had given her consent, it was, in the event, immaterial to the result.

13. On its Appeal Form filed with the Tribunal, and in written submissions which followed, the Employer alleged as grounds justifying the cancellation of the Determination that the Delegate had failed to observe the principles of natural justice in making the Determination, and that evidence had become available that was not available at the time the Determination was being made. Regarding the former, the Employer argued that the Delegate should not have accepted the evidence of Ms. Alcalde. Instead, he should have attributed more significant weight to the evidence and submissions of the Employer, which, it was argued, had a reputation for integrity over many years in business, and no previous complaints relating to its compliance with the provisions of the *Act*. As for the latter, the Employer identified as "new" evidence material gleaned from the Employer's corporate records which it argued would prove that Ms. Alcalde was untruthful when she stated that she did not consent to the impugned deductions from her wages.

14. In the Original Decision, the Member concluded that the Employer was provided with ample opportunity to know the basis for the complaint being made, and to make its case in reply. The Member dismissed as irrelevant the Employer's assertion that the Delegate failed to take into account the Employer's reputation for integrity over many years in business. The Member also determined that the Delegate's failing to disbelieve Ms. Alcalde's version of events was inconsequential in light of the fact that there was no significant difference in the evidence relating to the core facts supporting the Delegate's findings that the contraventions in question had actually occurred, and Ms. Alcalde's alleged agreement to the contraventions was nugatory due to the effect of section 4 of the *Act*. Finally, the Member declined to accept the Employer's argument that the evidence sought to be tendered on appeal was in fact "new" in

the proper sense, as it was available to the Employer at the time of the hearing conducted by the Delegate but the Employer did not present it.

15. On this application for reconsideration the Employer challenges the Original Decision on the ground that the Employer was not provided with the opportunity to attend another hearing to present evidence demonstrating that Ms. Alcalde was untruthful throughout, and that she had consented to the Employer's not paying her statutory holiday pay, and its deducting expenses from her paycheques. The Employer argues that there is a serious question of credibility that has been raised concerning the key issues arising from the complaint which, it suggests, may only be resolved at a further hearing.

ISSUES

16. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

- Does the request meet the threshold established by the Tribunal for reconsidering a decision?
- If so, should the decision be cancelled or varied or sent back to the original panel, or another panel of the Tribunal?

ANALYSIS

17. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

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

18. Previous decisions of the Tribunal, taking their lead from *Milan Holdings* BCEST #D313/98, have consistently held that the reconsideration power is discretionary, and must be exercised with restraint. This attitude is in part derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A losing party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision emanating from that process. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. Conversely, the winning party should not be subjected to further proceedings by way of reconsideration, and the possibility of a delay in the enjoyment of the fruits of the original decision, as a matter of course. Having regard to these principles, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.

19. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant reconsideration at all.

In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness: *Zone Construction Inc.* BCEST #RD053/06.

20. In my opinion, the Employer's application fails at the first stage of the inquiry. It follows that I have decided that the application does not warrant reconsideration at all.

21. The kernel of the Employer's argument is that the Tribunal should have conducted a further hearing on appeal and permitted the Employer to tender new evidence which would, it submits, have proven that Ms. Alcalde was a liar, that she had agreed to waive her entitlement to statutory holiday pay, and had consented to allow the Employer to deduct from her paycheque sums the Employer had paid in order for Ms. Alcalde to attend the hair competition in Milan.

22. The flaw in the Employer's position is that it would have made no difference, in my view, to the outcome on the appeal if a further hearing had been conducted and a specific finding had been made that Ms. Alcalde had agreed to these stipulations in her contract of employment as the Employer said she did. Section 4 of the *Act* is quite clear. It renders any agreement of the sort alleged by the Employer to have been made in this case, by the terms of which Ms. Alcalde consented to waive the minimum requirements of the *Act* relating to statutory holiday pay and payroll deductions, of no effect. That the Employer believes such a result to be unfair is not surprising, but it cannot affect the legal outcome. A major purpose of the legislation is to ensure that employees receive the minimum benefits provided in it. Employers are expected to know what the *Act* requires, and if they proceed to implement a regime which contravenes one or more of its stipulations, even in good faith, they do so at their peril.

23. As for the assertion that the Member should have conducted an oral hearing before deciding the appeal, it must be remembered that a combination of section 36 of the *Administrative Tribunals Act* and Rule 16 of the Tribunal's *Rules of Practice and Procedure* mandate that the Tribunal has a discretion to choose the form of hearing from amongst the options of written submission, electronic, and oral. The decision to conduct one type of hearing rather than another must be informed by the purposes of the legislative scheme contained in section 2 of the *Act* referred to above. The goals of efficiency and fairness do not of necessity import the requirement for an oral hearing in all cases. It depends on the issues at stake in the particular case. The key question is whether an oral hearing is essential in order that a party may know the substance of the case being made against it and make an informed and effective submission in reply (see *Great Canadian Bingo Corp.* BC EST #D046/06). Having regard to this formulation, and the current ambit of appellate jurisdiction entrusted to the Tribunal, for many, perhaps most, appeals coming before it an oral hearing may not be necessary.

24. As I have concluded that even if the Employer had proven at an oral hearing that Ms. Alcalde consented to the contraventions it would not have affected the legal result, it follows that there can be no objection taken to the decision of the Tribunal not to hold a further hearing.

25. In my view, the Employer has not demonstrated that there are questions of fact, law, principle or procedure flowing from the Original Decision which are so important that they demand intervention by way of reconsideration. It is therefore unnecessary to go on to the second stage of the inquiry.

ORDER

26. Pursuant to section 116(1)(b) of the *Act*, I order that the decision of the Tribunal dated December 5, 2006 under #D118/06 be confirmed.

Robert Groves
Member
Employment Standards Tribunal