

An Application for Reconsideration

- by -

Mauryabistro Ltd carrying on business as Maurya Bistro
("Mauryabistro")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/13

DATE OF DECISION: February 27, 2015

DECISION

SUBMISSIONS

Dharampall Sharma

on behalf of Mauryabistro Ltd carrying on business as Maurya
Bistro

INTRODUCTION

1. Mauryabistro Ltd carrying on business as Maurya Bistro (“Mauryabistro”) applies, pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), for reconsideration of BC EST # D118/14 issued by Tribunal Member Stevenson on November 28, 2014 (the “Appeal Decision”). The Appeal Decision upheld a Determination issued against Mauryabistro on August 6, 2014, pursuant to which it was ordered to pay its former employee, Ravindra Prasad Raturi (“Raturi”), \$26,730.56 on account of unpaid wages (predominantly overtime pay) and section 88 interest. Further, and also by way of the Determination, Mauryabistro was ordered to pay \$3,000 representing six separate \$500 monetary penalties (see section 98) based on its contraventions of sections 17 (regular paydays), 18 (payment of wages on termination), 40 (daily and weekly overtime pay), 45 (statutory holiday pay) and 46 (payment for working on a statutory holiday) of the *Act* and section 46 (production of payroll records) of the *Employment Standards Regulation* (the “*Regulation*”). Thus, the total amount payable under the Determination is \$29,730.56.
2. This application is not timely, having been filed on February 12, 2015, well past the 30-day limitation period (dating from the date of the Appeal Decision) set out in Rule 27(2) of the Tribunal’s *Rules of Practice and Procedure*. It would appear that the application was delayed, at least in part, because Mauryabistro filed a premature application for judicial review of the Appeal Decision (which was apparently summarily dismissed) rather than exhausting its internal remedies by way of filing a section 116 application.
3. Parenthetically, I should note that Mauryabistro refers to its present application as an *appeal* – that, of course, wholly misstates the nature of the present application. Mauryabistro has already appealed the Determination and that appeal has been summarily dismissed. The present application is for *reconsideration* of the Appeal Decision; *it is not an appeal of the Determination* nor is it an “appeal” of the Appeal Decision.
4. At this juncture, I am considering the application in light of the two-stage *Milan Holdings* test (see BC EST # D313/98) in order to determine if the application passes the requisite threshold of raising a serious question regarding the correctness of the Appeal Decision in order to justify a more fulsome consideration of the application on its merits. If the application does not pass the first stage of the *Milan Holdings* test, it will be summarily dismissed. On the other hand, if the application has some *prima facie* merit, the respondent parties will be notified and after all parties have been given an opportunity to make a response, the application will be adjudicated on its merits.
5. In reviewing this application, I have considered the complete record that was before Tribunal Member Stevenson as well as the further submissions that Mauryabistro filed in support of its reconsideration application.

FACTUAL BACKGROUND

6. Mr. Raturi worked as a cook at Mauryabistro’s Abbotsford restaurant (apparently no longer in business) from July 15, 2013, to March 27, 2014. On April 29, 2014, he filed an unpaid wage complaint. The complaint was

the subject of a complaint hearing before a delegate of the Director of Employment Standards (the “delegate”) on July 31, 2014, (Mauryabistro did not attend the hearing) and, as noted above, the delegate issued a Determination in favour of the complainant Mr. Raturi on August 6, 2014. Subsequently, and only after a late request to the delegate for written reasons (see section 81), the delegate issued “Reasons for the Determination” dated September 15, 2014 (the “delegate’s reasons”).

7. Mauryabistro did not appeal the Determination in a timely manner since it failed to perfect its appeal, as mandated by section 112(2) of the *Act*, within the statutory appeal period. Accordingly, Tribunal Member Stevenson had two related issues before him: first, whether the appeal period should be extended under subsection 109(1)(b) of the *Act*; and second, whether the appeal should be summarily dismissed as having no reasonable prospect of succeeding under subsection 114(1)(f) of the *Act*.
8. I should also note that Mauryabistro’s lack of alacrity in perfecting its appeal within the statutory time period, and its failure to file a timely reconsideration application, reflects a pattern of behaviour that appears to have been consistent throughout this entire adjudicative process (see, in particular, the delegate’s reasons at pages R3 – R4).
9. In the Appeal Decision, Tribunal Member Stevenson set out the relevant facts relating to the adjudication of the appeal as follow (paras. 3 – 6):

Maurya Bistro has filed an appeal of the Determination, relying on each of the grounds set out in section 112(1) of the *Act*: error of law; failure by the Director to observe principles of natural justice in making the Determination; and evidence becoming available that was not available when the Determination was being made.

A form of appeal was received by the Tribunal from Maurya Bistro on September 15, 2014, the final day of the appeal period. The filing was incomplete. It was delivered to the Tribunal by Dharampal Sharma (“Mr. Sharma”), the sole director of Maurya Bistro. In correspondence dated September 18, 2014, the Tribunal notified Mr. Sharma that under Rule 18(3) of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”), the appeal was incomplete and, as a result, late. The correspondence told Mr. Sharma what was needed to meet the requirements in the *Rules* for completing the filing of the appeal. He was given until 4:00 pm on September 25, 2014, to satisfy the requirements for an appeal. On that date, Maurya Bistro delivered an Appeal Form, appeal submission and several attachments to the Tribunal.

On October 1, 2014, the Tribunal acknowledged to the parties that an appeal had been received from Maurya Bistro, requested production of the section 112(5) “record” from the Director and notified the parties, among other things, that no submissions were being sought from them pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.

The section 112(5) “record” was provided by the Director to the Tribunal and a copy was sent to Maurya Bistro. A deadline of November 3, 2014, was set for any objection by Maurya Bistro to the completeness of the section 112(5) “record”. In correspondence delivered to the Tribunal November 3, 2014, Maurya Bistro submitted what was identified as a list of objections to the completeness of the record. In reality the correspondence does not address the completeness of the record at all. Rather the opportunity provided to rectify any perceived omissions from the section 112(5) “record” was taken as an opportunity for Maurya Bistro to supplement its appeal submission and provide assertions of fact and documents that were not provided to the Director during the complaint process nor provided with the initial appeal submission. I do not find anything in this correspondence to be responsive to the opportunity given and, based on the absence of any relevant response, I find the section 112(5) “record” to be complete.

10. With that background, Tribunal Member Stevenson then addressed the application to extend the appeal period. He ultimately concluded that even though the delay involved was not particularly lengthy, in light of the fact that the appeal had no presumptive merit (a factor to be considered in a subsection 109(1)(b)

application), he was not prepared to extend the appeal period. Further, given the complete dearth of any credible argument that the Determination should be varied or cancelled, he decided that the appeal should be dismissed under subsection 114(1)(f) of the *Act*.

11. Mr. Sharma, on behalf of Mauryabistro (its sole director who has represented the company throughout this entire matter) now applies to have the Appeal Decision reconsidered arguing that “I was never afforded an opportunity to state my case”. In addition, Mauryabistro says that the reconsideration application should be granted because there was a breach of the rules of natural justice relating to its non-attendance at the original complaint hearing. It also says that Mr. Raturi was paid in full and that his unpaid wage complaint should have been dismissed. Finally, it says that there was a breach of the rules of natural justice because the delegate’s reasons were not issued until September 15, 2014, the same day that the statutory appeal period expired.

FINDINGS AND ANALYSIS

12. The delay in filing this application is significant – some 1 ½ months after the time for filing a reconsideration application expired. I am not satisfied that Mauryabistro has provided an adequate explanation for its failure to file a timely reconsideration application. Mauryabistro says that it was financially unable to secure the services of legal counsel and that may be true but the Tribunal’s processes are simple and straightforward reflecting the fact that the vast majority of parties that are involved in matters before the Tribunal are unrepresented. Complete information relating to the reconsideration process is set out in a link accessible from the Tribunal’s home page.
13. However, I do not intend to rest my decision solely on the lateness of the application. This application raises no new issues, evidence or arguments that have not already been advanced and simply repeats some of the same arguments that were put forward – and affirmatively rejected – on appeal.
14. While it is true that Mauryabistro did not attend the original complaint hearing, that fact, in no way, raises a natural justice issue. Tribunal Member Stevenson summarized Mauryabistro’s explanation for its failure to attend the hearing at para. 17 of the Appeal Decision:

The complaint hearing scheduled for July 31, 2014, commenced at 9:30 am. There was no one present at that time to represent Maurya Bistro. An unsuccessful attempt was made to contact Mr. Sharma by telephone. The complaint hearing commenced at 10:00 am and proceeded in the absence of a representative for Maurya Bistro. At 12:30 pm on July 31, 2014, Mr. Sharma arrived at the Branch office where the complaint hearing was scheduled, saying he was ready to proceed. He told the receptionist he thought he could attend the Branch at any time between 9:30 am and 4:30 pm. He was told the hearing had started at 9:30 am and was now completed.

15. Despite the fact that Mauryabistro refused to accept delivery of the registered mail enclosing the hearing notice, it obviously received the notice (it was also sent by regular mail) as evidenced by the fact that Mr. Sharma ultimately attended at the hearing location, albeit many hours after the fact. Tribunal Member Stevenson held that Mauryabistro was essentially the author of its own misfortune in failing to attend the hearing (para. 51):

The other aspect of the natural justice ground of appeal raises a “fair hearing” argument. Maurya Bistro says it was not given an opportunity to be heard. The facts set out in the Determination do not support this argument. Based on those facts, I agree with the finding of the Director, that Maurya Bistro was given the opportunity required by section 77 of the *Act*, and by considerations of the principles of natural justice that operate in this context, to participate in the process and to provide its evidence and argument to the

Director. I do not accept for a moment that it was reasonable for Mr. Sharma to show up at 12:30 pm on the day of the complaint hearing [*Note: the hearing was scheduled to commence at 9:30 AM*] and expect to be heard. As I have earlier mentioned, it has not gone unnoticed that Maurya Bistro failed to respond to a Demand for Employer Records and there is nothing indicating Mr. Sharma attended the Branch office on July 31, 2014, actually prepared to participate in the complaint hearing, as opposed to simply making an appearance for the purpose of setting up an argument.

16. The notion that Mauryabistro's deliberate failure to attend the complaint hearing constitutes a breach of the rules of natural justice by the delegate is, in my view, a wholly disingenuous and untenable argument.
17. As for Mauryabistro's argument that Mr. Raturi was paid in full, Raturi's *viva voce* evidence that he was not was corroborated by independent bank records and the delegate was entitled to issue a decision based on the evidence before her that she reasonably considered to be credible. The determination of Mr. Raturi's unpaid wage claim was not tainted by any legal error.
18. As for the issue raised relating to the issuance of the delegate's reasons, although the delegate's reasons were not issued until the final day of the appeal period, it must be recalled that the *only* reason the reasons were issued on that day was because Mauryabistro failed to make a timely application for the issuance of reasons under section 81 of the *Act*.
19. To summarize, this application is untimely and I find Mauryabistro's explanation for its failure to file a timely application to be wholly unconvincing. As for the application itself, it is an undisguised request to simply have the Tribunal reverse the Appeal Decision without there being any valid legal reason for so doing. In my view, this application wholly fails to pass the first stage of the *Milan Holdings* test and, accordingly, must be summarily dismissed.

ORDER

20. Mauryabistro's application to have the Appeal Decision reconsidered is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal