

An application for Reconsideration

- by -

Gurbaksh Toor, a Director and Officer of Chanel Foods Ltd.
carrying on business as Subway

- 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.: 2011A/12

DATE OF DECISION: March 8, 2011

DECISION

SUBMISSIONS

Harry Toor	on behalf of Gurbaksh Toor, a Director and Officer of Chanel Foods Ltd. carrying on business as Subway
Mandeep Jaswal	on her own behalf
Paul Harvey	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Mr. Toor for a reconsideration of Decision # D133/10 (the “Original Decision”), issued by the Tribunal on December 20, 2010.
2. Mandeep Jaswal filed a complaint of unpaid wages against her employer, Chanel Foods Ltd. carrying on business as Subway (“Chanel Foods”). Following an investigation, a delegate of the Director of Employment Standards determined that Chanel Foods had contravened the *Act* and ordered Chanel Foods to pay Ms. Jaswal \$3,658.55, representing wages and interest. The Determination concluded Gurbaksh Toor was a Director/Officer of Chanel Foods at the time the wages were paid and found Gurbaksh Toor to be personally liable for an amount of \$3,722.59 under section 96 of the *Act*.
3. Ms. Toor appealed the Determination on the grounds that the Director erred in law, failed to observe the principles of natural justice in making the Determination and that evidence had become available that was not available when the Determination was issued. Ms. Toor also sought an extension of time in which to file the appeal.
4. The Member noted that the evidence submitted on appeal related to a challenge to the result of the Determination made against Chanel Foods on October 13, 2009, (the Corporate Determination). Although Ms. Toor also submitted that she had not been a director of Chanel Foods since 2008, the Member found no evidence to support this assertion.
5. The Member found that most of the arguments contained in Ms. Toor’s appeal did not relate to the Director’s decision finding her be personally liable for wages under s. 96.
6. Although the Member granted Ms. Toor’s application for an extension of time in which to file an appeal, he dismissed the appeal.
7. The Member found no basis for any of the grounds of appeal. He noted that although Ms. Toor contended that she had not been a Director/Officer during the relevant period, the corporate records indicated that she was. The Member relied on Tribunal jurisprudence in finding that Ms. Toor had not rebutted the presumption that she was in fact a director officer as indicated in the corporate records, nor had she established any circumstances that would relieve her from her personal liability.

ISSUES

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. Ms. Toor seeks reconsideration of the Original Decision for the following reasons:
 - Mandeep Jaswal is incorrect in the hours she presented;
 - she provided schedules with her hours not adjusted;
 - Mandeep Jaswal did take advances, which were to be paid back, she signed for the money; and
 - the Manager that dealt with the staffing and their hours is willing to be a witness that Mandeep Jaswal did not work the hours she is claiming. [reproduced as written]
10. The Director opposes the application because, he says, Ms. Toor submitted the same information and argument as in her appeal of the Officer/Director Determination. The delegate submits that Ms. Toor failed to provide any evidence to change the conclusion in that Determination and seeks to have the application dismissed.
11. Ms. Jaswal also seeks to have the application for reconsideration dismissed. She alleges that Ms. Toor is simply wasting time and money in filing the application and seeks the money owed to her.

ANALYSIS

12. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (“Act”) confers an express reconsideration power on the Tribunal. Section 116 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

13. 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 *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
14. In *Milan Holdings* (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.

15. 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)
16. 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 was not meant to allow parties another opportunity to re-argue their case.
17. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.
18. In *Voloroso* (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...
19. 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 favour 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.
20. One of the issues to be considered in a reconsideration application is the timeliness of the application. The Tribunal will consider delay in deciding whether to exercise the reconsideration discretion and where delay is significant, an applicant should offer an explanation for the delay. A delay which is not explained will militate against reconsideration.(*The Director of Employment Standards (Re Primadonna Ristorante Italiano)*, BCEST # RD046/01)
21. I find that Ms. Toor has not met the threshold test.

22. The record discloses that Ms. Toor provided no evidence on appeal to persuade the member that the Director/Officer Determination was in error resulting in the Member dismissing the appeal.
23. Ms. Toor's submissions in her application for reconsideration have no relevance to the issue before the Member, which was whether or not she was a director/officer at the time Ms. Jaswal's wages were earned. Ms. Toor's reconsideration request has not raised questions of law, fact, principle or procedure that are so significant that they ought to be reviewed.
24. I am not persuaded that Ms. Toor has made out an arguable case of sufficient merit to warrant the exercise of the reconsideration power.

ORDER

25. Pursuant to section 116 of the *Act*, this application for reconsideration is denied.

Carol L. Roberts
Member
Employment Standards Tribunal