

An application for Reconsideration

- by -

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/10

DATE OF DECISION: March 8, 2011

DECISION

SUBMISSIONS

Harry Toor	on behalf of Chanel Foods 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 Chanel Foods for a reconsideration of Decision # D131/10 (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.
3. Chanel Foods appealed the Determination and requested a suspension of the effect of the Determination under s. 113 of the *Act*.
4. Chanel Foods filed its appeal on September 20, 2010, ten months after the time for filing an appeal had passed. The Member reviewed the submissions of the parties and found no basis on which to extend the time for filing an appeal. Noting that the filing of the appeal coincided with proceedings by the Director to enforce the Determination, the Member found that the delay had been lengthy, that there was no indication of an intention to appeal the Determination and that further delay would be unduly prejudicial to Ms. Jaswal. The Member concluded that Chanel Foods had not demonstrated a *prima facie* case, observing, in particular, that Chanel Foods had failed or refused to participate in the investigation or comply with the delegate’s attempts to obtain production of the employer’s records.
5. The member denied Chanel Foods’ appeal.

ISSUES

6. 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

7. Mr. 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]

8. The Director opposes the application. He contends that Mr. Toor submitted the same information and arguments in his late appeal of the Corporate Determination. The delegate says that Mr. Toor did not participate in the investigation and that he has provided no evidence of alleged advances. Finally, the delegate submits that if there is a manager who is willing to testify to Ms. Jaswal's hours of work, that information constitutes new evidence which ought to have been provided during the investigation.
9. The Director submits that the reconsideration application should be dismissed.
10. Ms. Jaswal also seeks to have the application for reconsideration dismissed. She alleges that Mr. Toor is simply wasting time and money in filing the application and seeks the money owed to her.

ANALYSIS

11. 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

12. 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."
13. 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.
14. 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)

15. 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.
16. 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.
17. 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...
18. 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.
19. 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)
20. I find that Mr. Toor has not met the threshold test.
21. The record discloses that Mr. Toor failed to comply with the delegate’s investigation of Ms. Jaswal’s complaint. After the Determination was issued, Mr. Toor waited ten months to file his appeal of that Determination. The record suggests that the appeal was only filed after the Director commenced collection proceedings against Mr. Toor. The Member found no basis to grant Mr. Toor’s application to extend the time in which to file his appeal.
22. Mr. Toor’s application for reconsideration consists, very simply, of nothing more than arguments that have already been raised, or ought to have been raised in his appeal submissions.

23. In my view, Mr. Toor's reconsideration request has not raised questions of law, fact, principle or procedure that are so significant that they ought to be reviewed. I am not persuaded that Mr. Toor has made out an arguable case of sufficient merit to warrant the exercise of the reconsideration power.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal