

An application for Reconsideration

- by -

Baggio's Ristorante Ltd.
("Baggio's")

- 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: Philip J. MacAulay

FILE No.: 2006A/121

DATE OF DECISION: April 2, 2007

DECISION

SUBMISSIONS

Tony Bagg on behalf of Baggio's Ristorante Ltd.
Carrie H. Manarin on behalf of the Director

OVERVIEW

1. Baggio's Ristorante Ltd. ("Baggio's") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of a decision BC EST # D121/06 made by the Tribunal on December 13, 2006 (the "Original Decision"). The Original Decision considered an appeal of a Determination issued by a delegate (the "Delegate") of the Director of Employment Standards on September 1, 2006 (the "Determination"). The Determination considered complaints filed by Joanne Donaghy and Kent Pellerin (the "Employees") in respect of their employment with Baggio's.
2. In her Determination, the Delegate found that Baggio's had contravened sections 18, 40, 46, 58 and 63 of the *Act* and imposed a total of \$3,000.00 in administrative penalties with regard to those contraventions.
3. As well, the Delegate determined that the Employees were entitled to wages, annual vacation and statutory holiday pay, overtime, compensation for length of service and interest accrued under Section 88 of the *Act*, totalling \$11,692.59.
4. Baggio's appealed the Determination to the Tribunal claiming that the Delegate had erred in law in making her Determination.
5. In his Original Decision of December 13, 2006, the Tribunal Member found that the appeal had failed and confirmed the Determination pursuant to Section 115 of the *Act*.

THE NATURE OF RECONSIDERATION

6. Section 116 of the *Act* provides a discretionary option to the Employment Standards Tribunal to reconsider its Decisions regarding the appeal of the Determinations of the Delegate for the Director of Employment Standards.
7. The initial appeal from a Determination to the Tribunal is governed by Section 112 of the *Act* and is restricted by the *Act's* terms.
8. Specifically, an appeal from a Determination must be based upon one or more of the following:
 - a) The Director . . . erred in law
 - b) The Director . . . failed to observe the principles of natural justice, or
 - c) Evidence had become available that was not available at the time the determination was made.

9. As stated above, Baggio's had alleged only the first ground of appeal, i.e. the Director had erred in law. The onus is on the appellant to prove its case in order to succeed on such an appeal.
10. A party dissatisfied with a decision of the Tribunal may apply for a reconsideration of that decision pursuant to Section 116 of the *Act*. It is such an application which is now before me.
11. A reconsideration is at the discretion of the Tribunal and does not arise as a matter of right of the appellant.
12. Section 116 of the *Act* provides;

“116(1) On application under subsection (2) or on its own motion, the tribunal may

- (a) reconsider any order or decision of the tribunal
- (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
- (2) The Director or a person named in a decision or order of the tribunal may make an application under this section.
- (3) An application may be made only once with respect to the same order or decision.

13. The recent reconsideration decision of the Tribunal in P&J International Stoneworks Inc., BC EST #RD014/07 of January 31, 2007, provides a useful synopsis of the process of reconsideration to be employed by the Tribunal in paragraphs 9 to 12 of that decision:

“Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d) is “*to provide fair and efficient procedures for resolving disputes over the interpretation and application*” of its provisions. Another stated purpose, found in subsection 2(b), is to “*promote the fair treatment of employees and employers*”. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST # D31398 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is the original decision.

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- Failure to comply with the principles of natural justice;
- Mistake of law or fact;
- Significant new evidence that was not reasonably available to the original panel;

- Inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- Misunderstanding or failure to deal with a serious issue; and
- Clerical error.

It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.”

THE APPLICANT BAGGIO’S SUBMISSION

14. In its Application for Reconsideration Baggio’s makes the following points:
1. The Tribunal member had erred in concluding that the Employees had met the six month limitation period set out in Section 74 of the *Act* for making their initial complaint. Baggio’s had maintained that the complaint time period should have commenced on the last date the Employee’s worked as opposed to the date the restaurant ceased to carry on business, or November 8, 2005. If the time period commenced on the earlier dates, Baggio’s argues that the complaints were filed out of time. (Records indicate that the complaint of employee Donaghy was filed May 3, 2006, and the employee Pellerin on April 28, 2006.) Baggio also maintained that both employees had received separation or lay-off notices in October, 2005, which stipulated that the last day of work was to be October 28, 2005.
 2. The Tribunal member had erred in concluding that Baggio’s had contravened the *Act* in its various failures to produce employment records. In its Application for Reconsideration, Baggio’s alleges that Baggio’s landlord had “thrown them out” when it took possession of the restaurant premises making it impossible for their production.
 3. The Tribunal member (as had the Delegate before him) had erred in proceeding on the basis of written submissions as opposed to an oral hearing.
 4. Baggio’s wished to offer new evidence about the employee Donaghy’s status as day manager and was therefore not entitled to overtime pay.

THE DELEGATE’S SUBMISSION

15. The Delegate’s position is that no new evidence has been presented by Baggio’s which it did not have the opportunity to present during the investigation of the matter.

ISSUE

16. Has the Appellant raised a valid argument for reconsideration?

ANALYSIS

17. In my view, the only issue raised by the Appellant which, if accepted, would properly lead to a decision to allow a reconsideration, surrounds the question of whether or not the employees had initiated their complaints within the six-month time limit set out in section 74(3) of the *Act*. If the Delegate erred in this

regard, it could be that permitting the complaints to go forward would be either an error in law or an error of mixed law and fact.

18. The other grounds concerning why employment records had not been produced, why an oral hearing did not occur and whether new evidence should be heard at this stage were either previously appropriately determined on the basis of valid findings of fact or, in the case of alleged “new evidence”, did not constitute evidence which could not have been advanced by Baggio’s at the initial stage of this proceeding. I consider that submissions 2 – 4 are, effectively a re-argument of issues properly dealt with earlier and which should not be re-visited by way of reconsideration.

19. When Baggio’s first appealed to this Tribunal from the Delegate’s initial Determination it stated:

“The respondents were terminated on Nov 8 as stated by the director and I was not notified that a claim was being filed until a call from the director on June 14 that’s 38 days after the 6 month time limit for a complaint to be made.” (my underlining)

20. In other words, Baggio’s position was that a complaint was not perfected until the subject respondent was notified, as opposed to the date upon which the complaint was filed with the Employment Standards Branch.

21. In response to this initial position which had adopted the Nov 8 date, the Delegate refers to section 74 of the *Act* and notes that the employee Donaghy filed her complaint on May 3, 2006 and the employee Pellerin, on April 28, both within the time required under the *Act*.

22. In this regard, the Delegate was clearly correct and her findings were upheld by the Tribunal in its Decision. Section 74(3) requires that a complaint “must be delivered under subsection (2) within 6 months after the last day of employment”. Subsection (2) provides that the complaint “must be delivered to an office of the Employee Standards Branch”. The date the subject respondent is then notified of a filed complaint is not relevant to meeting the six month time limit.

23. In its subsequent “Final Reply” Baggio’s abandons its earlier statement that “the respondents were terminated on November 8 as stated by the director” and alleges that the “last day worked” by both employees was October 27, 2005 which, if accepted as the commencement date of the six month time limit, would put both complaints “out of time”.

24. It should be noted that at the earlier stage of the proceeding before the Delegate Baggio’s had also maintained that all employees (including Donaghy and Pellerin) had received notice of separation in October of 2005 and pursuant to that notice that the complainant’s last day was to be October 28, 2005. Importantly, in her Determination the Delegate notes:

“On July 17, 2006, Mr. Bagg wrote in an e-mail that he had given written layoff notices to the complainants on October 14, 2005 to take effect on October 30, 2005 but that Ms. Donaghy was “offered to stay on with us fulltime hours”. Then on July 19, 2005 Mr. Bagg wrote in an e-mail that he had found the layoff notices and that the complainants last day was to be October 28, 2005. The complainants deny that they were given layoff notices. Consequently I asked Mr. Bagg to provide me with copies of the layoff notices but he did not provide any.” (my underlining)

25. The Delegate also noted that both complainants received no notice of termination or compensation in lieu of notice.

26. In its current Application for Reconsideration before this Tribunal, Baggio's again raises the question of lay-off notices, states that the complainants "both got separation notices in October 2005 as did all my other employees. I have proof of this from the other employees", and goes on to allege that the last day worked was "the 27 Oct 2005 not the 8 of Nov 2005 as indicated in your decision. This is also indicated in there [sic] last pay request".
27. In reviewing the earlier Decision of this Tribunal (from which Baggio's now seeks reconsideration) it is not clear to me that the Member considered the latter position taken by Baggio's in its Final Reply as to the "last day worked" (i.e. October 27, 2005) as contrasted with Baggio's first position in the original Appeal that "the respondents were terminated on November 8 as stated by the director . . ."
28. At two points (paragraph 8 and 11) the Member states:
- Para 8: "The Appellant submitted that the time limitation specified in s. 74 of the *Act*, specifically that the claim must be made within six months from the alleged contravention, was not met. He indicated that the complainants were terminated on November 8, 2005, and he was not notified that a claim had been filed until June 14, 2006 (38 days late)." (my underlining)
- And
- Para 11: "The Appellant agreed with the Complainants and the Director, that the date of the alleged contraventions and the date of termination of employment of both Complainants was November 8, 2005 ..."
29. It is, therefore, not evident in the Member's Decision that he had specifically considered Baggio's second position as set out in its Final Reply, i.e. that separation notices had been given and the last day worked "was 27 Oct 2005 not the 8 Nov 2005 as indicated in your decision".
30. On the other hand, the Member may have considered the Final Reply but did not feel that the issue it raised, being unsupported by any documentary evidence of a lay-off notice, required any comment.
31. Given that the time-limitation issue is potentially determinative and the possibility that the Member overlooked an aspect of Baggio's argument concerning it, I conclude that the circumstances are such that the exercise of the Tribunal's discretion to reconsider is warranted and I so find.
32. Having allowed the request for a reconsideration, I move to the second stage of analyzing the merits of the issue raised. In this regard, for the reasons stated earlier, this reconsideration is restricted to the time-limitation issue.
33. In my view, if there were appropriate lay-off or separation notices provided to the subject employees which stipulated that October 27 was the "last day of employment", that would be the date from which one would calculate the six-month period set out in section 74(3). The subsequent restaurant closure on November 8 would not be relevant.
34. However, as was noted earlier, Baggio's was asked to produce copies of these alleged notices by the Delegate before she made her Determination. Baggio's did not produce such notices at that time or, indeed, at any time since, either prior to the first Tribunal Decision or as part of this Reconsideration Application.

35. Even if Baggio's had tried to introduce copies of such notices before the Tribunal and, certainly on this Reconsideration, it would have been faced with the prospect of having to show that such evidence was not otherwise available to be presented at an earlier stage of the process before it would be considered.
36. If there is no persuasive evidence of a notice setting the "last day of employment" that is over six months prior to the filing of the two complaints, then an argument based on that limitation will not succeed. Here, there is no accepted evidence of any termination notice being given prior to the closure of the restaurant on November 8, 2005.
37. "Termination of employment" as used in section 74(3) of the *Act* is not the same as "the last day worked". A "termination" may be by way of explicit notice effective immediately or at some specific time in the future. It may also arise by virtue of the *Act*'s provisions concerning "temporary lay-offs" as defined.
38. In addition, section 66 provides that "if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated".
39. The definition section of the *Act* provides that "conditions of employment" means "all matters and circumstances that in any way affect the employment relationship of employers and employees".
40. In this case, the Delegate of the Director determined:
- "The complainants' employment was terminated on November 8, 2005 when the employer's business closed. No notice of termination was given to them or compensation in lieu of notice."
41. Accordingly, the termination of employment" was November 8 and the complaints were, therefore, filed within the 6 month time limitation.

ORDER

42. I find, pursuant to section 116(1)(b), that there is no basis to alter the Decision of December 13, 2006, which, in turn, had confirmed the Determination of the Delegate of September 1, 2006. The Decision is confirmed.

Philip J. MacAulay
Member
Employment Standards Tribunal