An Application for Reconsideration

- by -

0777746 B.C. Ltd. carrying on business as Mama Z's Jade Boulder Cafe
(the "Employer")

- 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 E. Groves

FILE No.: 2014A/3

DATE OF DECISION: April 29, 2014

DECISION

SUBMISSIONS

Fred Wynne	counsel for 0777746 B.C. Ltd. carrying on business as Mama Z's Jade Boulder Cafe

OVERVIEW

1. On January 16, 2014, pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), 0777746 B.C. Ltd., carrying on business as Mama Z's Jade Boulder Cafe (the "Employer") filed an application for reconsideration of a decision of a Member of the Tribunal dated January 23, 2013, and numbered D006/13 (the "Original Decision"), regarding the complaint of Salvatore Zaccaro ("Zaccaro").

2. The Original Decision resulted from an appeal by the Employer of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") and dated October 1, 2012, following an investigation conducted pursuant to section 76 of the *Act*.

3. The Delegate found that the Employer had contravened sections 17 and 18 of the *Act* in failing to pay all wages owing to five of its former employees, including Zaccaro. The Delegate found that a total of $29,271.44 in wages and interest was payable to the employees, of which $10,386.91 was found to be owed to Zaccaro. The Delegate also imposed two $500.00 administrative penalties for the contraventions. The total found to be payable was $30,271.44.

4. The Original Decision dismissed the Employer's appeal of the Determination.

5. I have before me the Determination, the Reasons for the Determination, the record supplied to the Tribunal by the Director pursuant to subsection 112(5) of the *Act*, documents and submissions delivered in the appeal proceedings, the Original Decision, as well as documents and submissions received on this application for reconsideration.

6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

7. At all material times, the Employer operated as a restaurant in Dease Lake.

8. Zaccaro advised the Delegate that he was hired as the executive chef at the restaurant in late January 2011 at a salary of $3,200.00 monthly. He stated that although he worked from January 20, 2011, until May 27, 2011, he never received his regular monthly wage. Instead, a principal of the Employer, Zora Ivanovska, paid him cash for part of the wages owed to him.

9. In the Original Decision, the Member stated that the Delegate advised the Employer of Zaccaro's complaint, but received no response. The Member also stated that the Delegate issued a Demand for Payroll Records,

and sent a letter outlining his preliminary assessment in favour of Zaccaro, but the Employer replied to neither.

10. In his Reasons for the Determination the Delegate stated that he had "some concerns" about Zaccaro's claim. He was troubled, principally, by the fact that Zaccaro's claim for unpaid wages appeared to request payment of a sum that was less than the amount that his other evidence suggested was owed to him. However, as the Employer had not responded in substance to Zaccaro's claim, the Delegate accepted Zaccaro's claim as presented, and added an amount for unpaid vacation pay.

11. On appeal, the Employer argued that the Delegate had failed to observe the principles of natural justice. The Employer asserted that since the communications the Delegate directed to the Employer during the course of his investigation were not received, the Employer had no reasonable opportunity to respond to Zaccaro's complaint. More particularly, the Employer alleged that the Delegate knew that the restaurant was open only seasonally, in the summer, and that it was, therefore, unreasonable to expect the Employer to receive correspondence during the winter months. Moreover, the Employer stated that since it had responded in substance to the other four complaints filed by employees at the restaurant, the Delegate should have made further inquiries of the Employer as to why it had not made similar submissions regarding Zaccaro.

12. The Employer further argued that had the Delegate made other successful attempts to communicate with the Employer regarding Zaccaro, the Employer would have provided the relevant records showing that Zaccaro could not have worked either the hours, or in the capacity, he had claimed in his complaint. The Employer therefore sought to introduce new evidence on appeal relating to those matters.

13. The Tribunal Member dismissed the Employer's appeal. She did so pursuant to subsection 114(1)(f) of the *Act*, which permits the Tribunal to dismiss an appeal on the ground that there is no reasonable prospect that the appeal will succeed.

14. On the natural justice issue, the Member said this:

> 21. The record discloses that on December 8, 2011, the Director emailed Ms. Ivanovska, a Director of 0777746 BC Ltd., notifying her of Mr. Zaccaro's complaint. The same day, a Demand for Employer Records was also sent by registered mail to the Employer's Dease Lake address. Canada Post tracking results confirm that the package was signed for on January 23, 2012. The signatory name is "Mama Z Jade Boulder Cafe".
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> 22. On May 29, 2012, the Director sent a preliminary assessment letter to the Employer, with a copy by email.
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> 23. I am satisfied, based on the Record, that the Director complied with the principles of natural justice by providing the Employer with an outline of the complaint and by seeking the Employer's response. The complaint information was provided to the Employer both by registered mail and by email. Although counsel for the Employer contends that the Employer operated the restaurant seasonally, the Canada Post tracking information confirms that the package was signed for at the end of January. If the signatory was not Ms. Ivanovska, it was an individual who had ostensible authority to act on the Employer's behalf. Furthermore, the Director provided the Employer with his assessment of the complaint by both mail and email at the end of May when the restaurant was allegedly back in operation for the summer months.
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> 24. I am not persuaded that the Employer did not either have knowledge of the complaint or the opportunity to respond to it.
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> 25. I am also not persuaded that the delegate failed to comply with section 77 of the *Act*, which requires the director to "make reasonable efforts to give a person under investigation an

> opportunity to respond" (my emphasis). As the Tribunal has said on many occasions, the section 77 statutory obligation is a manifestation of one of the statutory objectives of the *Act* as set out in Section 2: *to provide fair and efficient procedures for resolving disputes over the application and operation of this Act*. (see *Insulpro* BC EST #D405/98). I find that the delegate met the statutory requirement of making reasonable efforts to give Mama Z's the opportunity to respond. I note, in particular, that the delegate acknowledged that the investigation extended over "an abnormally long period" because the Employer was out of contact for long periods of time. There is simply no evidence to support Mama Z's assertions that the Director failed to comply with the principles of natural justice.

15. The Tribunal Member also rejected the Employer's arguments concerning new evidence. She concluded that since the Employer did have a reasonable opportunity to respond to the Zaccaro complaint, and the evidence the Employer sought to present on appeal was available to it during the course of the delegate's investigation, it should have been presented before the Determination was issued. Accordingly, it was not "new" in the sense intended in subsection 112(1)(c) of the *Act*.

ISSUES

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

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?

2. If so, should the decision be confirmed, cancelled, varied or referred 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, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

18. The Tribunal's reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not granted automatically to a party who disagrees with an order or decision of the Tribunal in an appeal.

19. The Tribunal's approach to applications under section 116 is 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 desire to preserve the integrity of the appeal process described in section 112 of the *Act*.

20. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Member in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the

answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the decision which are sufficiently important as to warrant reconsideration.

21. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

22. In this case, there is an issue of the timeliness of the Employer's application for reconsideration which I must address as a preliminary matter. The Original Decision was issued on January 23, 2013. The Employer's application for reconsideration was filed on January 16, 2014, nearly one year later.

23. Section 27(2) of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") – formerly section 25(2) – states that the Employer should deliver its application for reconsideration within 30 days after the Original Decision. Section 27(3) of the *Rules* – formerly section 25(3) – states that if an applicant delivers the application for reconsideration more than 30 days after the Tribunal's decision, the applicant must provide written reasons for the delay.

24. The Employer submits that the reason for the delay in filing its application for reconsideration is that it initially chose to challenge the Original Decision by means of an application for judicial review. The Employer filed its application for judicial review in March 2013, and served notice of the application on the Director and the Tribunal early in June 2013. The Employer also submits that some respondents were also served.

25. The Employer states that by correspondence dated June 10 and June 11, 2013, counsel for both the Tribunal and the Director took the position that an application for reconsideration under the *Act* should have been filed prior to the commencement of the judicial review proceedings. Counsel for the Employer advises that he disagreed with that position, and after further discussions later in June it was agreed that the judicial review proceedings would be held in abeyance until the Employer either served the individual respondent employees named in these proceedings, or commenced an application for reconsideration under section 116 of the *Act*.

26. The Employer states it encountered significant difficulties in locating and serving all of the individual respondents with its judicial review application. The Employer says in October 2013 counsel for the Director wrote to the Employer allowing it until January 15, 2014, to either serve the individual respondents or to file an application for reconsideration. The Employer was unsuccessful in serving all of the individual respondents and so, on January 16, 2014, it filed its application for reconsideration with the Tribunal.

27. In *Re Perera*, BC EST # RD071/13, the Tribunal reviewed the principles to be applied when considering whether an application for reconsideration should be dismissed as untimely. During the course of its examination, the Tribunal reaffirmed that the time limit for bringing an application for reconsideration may be extended, in appropriate cases, because the Tribunal has the power to determine its own procedures within the jurisdiction conferred to it under the *Act*. In exercising its discretion to consider late applications, the Tribunal will consider the length of the delay, the reasons for the delay, the conduct of the applicant and the merits of the application.

28. In *Alpha Neon Ltd.*, BC EST # RD032/12, the Tribunal was presented with a factual situation similar to the one that is before me now. There, the application for reconsideration was also untimely because the applicant decided, instead, to file an application for judicial review. The applicant justified this on the basis that the arguments it proposed to make on judicial review were the same as the ones it had presented to the Tribunal on appeal, and so any decision on reconsideration would be redundant. The Tribunal Member

deciding the application for reconsideration concluded this did not constitute a satisfactory explanation for the delay.

29. In my view, the delay here is unreasonable and I am not persuaded the Tribunal should exercise its discretion to consider the late application. The Tribunal's *Rules* provide for a filing period of 30 days. The application for reconsideration was filed nearly a year after the Original Decision was issued. While the Employer attempted to challenge the Original Decision by judicial review not long after it was issued, counsel for the Director and counsel for the Tribunal advised the Employer in June 2013 that it should apply for reconsideration prior to proceeding with its application for judicial review. It seems that the parties disagreed about that. It also appears that counsel for the Employer agreed that the Employer should either proceed with its application for judicial review, or an application for reconsideration. While counsel for the Employer states that it was contemplated at that time that a late application for reconsideration might be made, there is no evidence that counsel for the Director, or the Tribunal, ever conceded that any application for reconsideration the Employer might file should be permitted to proceed, notwithstanding the delay.

30. The Employer has provided no substantive reason why an application for reconsideration was not filed in a timely way. It notes it has had difficulty serving the individual respondents on its judicial review application. However, an application for reconsideration does not require the applicant to serve the individual respondents. The Employer does not explain why it could not file its application for reconsideration until January 2014. In my view, the fact that a party has decided to file an application for judicial review and was unable to serve the respondents with that application is not an adequate reason to explain a failure to file an application for reconsideration. Counsel for the Employer posits, in his submission, that it is far from certain that there is a strict requirement that reconsideration occur prior to an aggrieved party making an application for judicial review of a decision of the Tribunal. However, the courts have confirmed that parties should exhaust the remedies made available to them within the statutory scheme before embarking on judicial review (see *BC Ferries* 2013 BCCA 497 p. 39-41; *Carriere* 1995 BCJ No 2927).

31. Moreover, a review of the merits of this application has failed to persuade me that the Employer has presented a clear and compelling case for reconsideration.

32. In its application for reconsideration, the Employer repeats the arguments made in the appeal that the Delegate did not make reasonable efforts to contact the Employer about the Zaccaro complaint, with the result that there was evidence available that the Employer would have delivered to the Delegate, but did not, because the Employer was not aware of the complaint before the Determination was issued.

33. The Delegate's record included the Canada Post particulars of delivery, by registered mail, of a Demand for Employer Records relating to Zaccaro, on January 23, 2012. As the Tribunal Member indicated in the Original Decision, the signatory name for the person to whom the Demand was successfully delivered was "Mama Z Jade Boulder Cafe".

34. I also note that the email address for the Employer to which the Delegate sent a copy of his preliminary assessment on May 29, 2012, is the same email address to which the Employer says Zaccaro sent a compromising email on August 4, 2011. The Employer relied on that August 4, 2011, correspondence as part of the new evidence it sought to tender in the appeal proceedings that resulted in the Original Decision. The inference I draw from this is that the email address was a valid address at which the Employer did receive at least some email communications.

35. The May 29, 2012, preliminary assessment appears to have dealt with all of the complaints that had been delivered in respect of the Employer, including Zaccaro's. The letter stated expressly that "a considerable

amount" of documentation had been received regarding the complaints, with the exception of Zaccaro's, for whom the Delegate had received "no records whatsoever." The Delegate went on to state the amount of wages that appeared to be owed to Zaccaro; the same amount that later appeared in the Determination before the addition of vacation pay. The Delegate then advised that if the Employer disputed the wages said to be due, it should do so within a stipulated time period, otherwise a determination would be issued.

36. In the context of an investigation conducted by the Director, the obligation to provide an opportunity to respond to allegations is set out in section 77 of the *Act*. That section reads:

> 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

37. The obligation is that the Director take reasonable steps to provide notice of a complaint and give a party an opportunity to respond. Here, a Demand for Employer Records was forwarded to the Employer, and someone signed for the document indicating that he or she represented the Employer. Section 122 of the *Act* deems such documents to have been served if sent by registered mail to a person's last known address. There is no indication that the address to which the Demand was sent was not such an address.

38. The May 29, 2012, preliminary assessment email was forwarded at a time of the year when the restaurant was, by all accounts, open. It was sent to an email address that Zaccaro had employed with success when communicating with the Employer via that medium. The fact that the Delegate sent this email to this address directly contradicts the statement of the Employer in its submissions on appeal, and on this application for reconsideration, to the effect that the Delegate did not act reasonably because he did not attempt to contact the Employer by, *inter alia*, email. In fact, he did so.

39. For these reasons, I cannot conclude that the Tribunal Member was wrong in deciding that reasonable efforts had been made to notify the Employer of the Zaccaro complaint.

40. The Employer argues that the Delegate should have felt it curious that the Employer responded to the other complaints that had been filed, but not Zaccaro's, and so he should have made other efforts to contact the Employer to ensure that the Employer had received actual notice of Zaccaro's complaint. In my view, it was equally open to the Delegate to conclude that having received notice of the other complaints, the Employer must also have been apprised of Zaccaro's complaint, and had decided that no substantive response to it should be made.

41. As I have decided that the Tribunal Member was correct in concluding that the Delegate made reasonable efforts to provide the Employer with an opportunity to respond to the Zaccaro complaint, it follows that the Tribunal Member was also correct in determining that the new evidence the Employer sought to tender on the merits should not be considered.

42. I note that in the Employer's submission on reconsideration it identifies other grounds on which it says the Original Decision should be cancelled. More particularly, the Employer submits that the Tribunal Member failed to:

- apply the law relating to when an oral hearing ought to be held;
- comply with the principles of natural justice by making decisions on the basis of documents only, without obtaining the best evidence and confirming the reliability of that evidence through an oral hearing; and

- consider [the Tribunal's] own past record leading to a conclusion inconsistent with its previous jurisprudence.

43. The Employer's submission states that these issues apply to all the applications for reconsideration that have resulted from the various appeals considering the Determination, and the complaints that prompted it, including, presumably, Zaccaro's. That being said, it is not obvious upon a review of the Employer's materials on the Zaccaro appeal that these issues were meant to apply to his specific case.

44. I do note, however, that the Employer's submissions on appeal did emphasize the Delegate's comment, in the Reasons for the Determination, to the effect that the Delegate "had some concerns" about Zaccaro's claim because his evidence appeared to argue in support of his being owed more wages than he was actually claiming. This reference suggests, at least by inference, that the Delegate was questioning the validity of Zaccaro's monetary claim, and the quality of the evidence that supported it.

45. On the application for reconsideration, the Employer raises this evidentiary concern more squarely, in these terms:

> ...the employer submits that when there are issues of credibility and in cases where the documents give an incomplete picture...the Delegate (and subsequently the Tribunal on appeal) must at the very least engage in a judicial analysis as to whether an oral hearing must be held.
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> ...
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> ...with respect, the Delegate in the investigative process and the Tribunal on appeal did not engage in the requisite judicial analysis of whether the evidentiary problems required an oral hearing. Further the Employer submits that had the requisite judicial analysis been undertaken then an oral hearing would have been the only way to resolve the evidentiary difficulties in these cases.

46. Given these submissions, I have decided to address the Employer's submissions to the effect that the Delegate needed to conduct an oral hearing to test the substance of Zaccaro's complaint, and that it was a failure to observe the principles of natural justice on the part of the Delegate to fail to do so.

47. Subsection 76(1) of the *Act* does oblige the Director to "accept and review" complaints. However, subsections (2) and (3) of section 76 make it clear that the Director has a broad discretion when deciding the method(s) that may be employed in order to dispose of complaints. The Director may, for example, choose to "review, mediate, investigate or adjudicate" a complaint.

48. Moreover, the Director's powers should not be viewed exclusively, in the sense that only one avenue for the handling of a complaint must be chosen at the outset, with all others permanently removed from the Director's arsenal thereafter. In my view, it would subvert the attainment of the policy objectives set out in section 2 of the *Act* if the Director's powers were to be circumscribed in this fashion.

49. The handling of a complaint is a multi-faceted process. The approach the Director may take in bringing the process to a conclusion may change as circumstances warrant, and as information is gathered. What the legislature appears to have intended is that the process be flexible, in keeping with the desire that complaints be dealt with expeditiously, and at modest cost, if possible.

50. It follows, and the Employer concedes, that the parties in complaint proceedings have no absolute right to an oral hearing. As stated in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] SCJ No.39:

> ...it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.

51. As the Employer points out, there have been cases where the Tribunal has decided that a delegate's refusing to conduct an oral hearing to resolve a complaint amounted to a failure to observe the principles of natural justice (see, for example, *Enviro Surface Care Ltd.*, BC EST # D037/10, and *C&W Salvage Ltd.*, BC EST # D103/12). That said, I am of the opinion that the Tribunal would find it difficult to make such a determination absent its finding that the complaint could only be resolved fairly if an oral hearing were to be conducted and, conversely, that it would be an abuse of the Director's discretion if any other mode of proceeding were selected.

52. In both the *Enviro* and *C&W* cases, the resolution of issues of credibility was fundamental to the ultimate disposition of the complaints. In both cases, legal counsel had requested oral hearings before determinations were issued by the delegate.

53. In *Enviro*, the Tribunal said this:

> 33. ...While I do not wish to be taken as suggesting that an oral complaint hearing must inevitably be held where credibility issues arise, in this case, these issues were at the centre of the dispute between the parties and colour every issue that was before the delegate for determination….

54. The following comments are taken from *C&W*:

> 16. ...It is clear that on almost every important issue there was an aspect concerning the credibility of some evidence relied upon by the delegate….
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> ...
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> 19. In this case there was direct conflict of evidence of the parties on numerous key issues. The decisions on credibility by the delegate are central to the key issues. CW counsel's submissions regarding credibility suggested that the delegate hold an oral hearing; but it appears that the delegate, after consultation with his manager, decided to continue with the investigative approach. The Director did not make specific submissions on this appeal regarding why declining an oral hearing was appropriate in these circumstances; or why the investigative process was preferred.

55. Zaccaro's complaint presents an entirely different scenario. No one on behalf of the Employer requested that the Delegate adjudicate the complaint by means of an oral hearing. No evidence was presented by the Employer that challenged the evidence of Zaccaro.

56. The Delegate did question the internal consistency of Zaccaro's account. That is a different thing from rejecting it, however. In the result, the Delegate opted to determine that Zaccaro was owed wages in an amount that Zaccaro himself had said he was entitled to receive, notwithstanding that the amount he had claimed was less than the sum to which Zaccaro's evidence suggested he might be entitled. The principal reason for the Delegate's decision on this point was that the Employer had not challenged the amount that Zaccaro had sought.

57. In the circumstances, there was no significant issue of credibility for the Delegate to resolve that required he conduct an oral hearing in order to ensure fairness.

58. For all of these reasons, I have decided that the Employer has failed to demonstrate that the conclusions reached in the Original Decision warrant reconsideration.

ORDER

59. Pursuant to section 116 of the *Act*, I order that the Original Decision be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal