An Application for Reconsideration

- by -

0697655 B.C. Ltd. carrying on business as the Rocking Horse Pub

- 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: Yuki Matsuno

FILE No.: 2009A/003

DATE OF DECISION: March 24, 2009

DECISION

SUBMISSIONS

David and Karen Willoughby	for 0697655 B.C. Ltd. carrying on business as the Rocking Horse Pub
Ann-Marie Bampfield	for Thomas J. Bampfield
Kristine Booth	for the Director of Employment Standards

OVERVIEW

1. On behalf of 0697655 B.C. Ltd. carrying on business as the Rocking Horse Pub (the "Employer"), David and Karen Willoughby apply for reconsideration of Decision BCEST #D119/08, issued by the Tribunal on December 11, 2008 (the "Decision"). The Decision was issued regarding an appeal by Mr. and Mrs. Willoughby of a determination issued by a delegate of the Director of Employment Standards (the "Director") dated September 5, 2008 (the "Determination"). The Determination concerned the complaint of Thomas J. Bampfield (the "Employee"), who was employed as kitchen help with the Employer.

The Determination

2. The issues that the delegate had to decide in the Determination were (1) whether the Employee was entitled to compensation for gratuities and (2) whether the Employee was entitled to compensation for length of service. Regarding the first issue, the delegate pointed out that the definition of "wages" in section 1 of the *Employment Standards Act* (the "*Act*") does not include gratuities unless the employer uses them to cover a cost of doing business. The delegate found that the Employee failed to discharge his burden of showing that the gratuities were used to pay for a business cost and therefore was not entitled to compensation for gratuities.

3. With respect to compensation for length of service, the delegate first dealt with the issue of the Employee's term of employment. The delegate outlined the evidence before her and concluded that the Employee worked his first shift on January 30, 2008 and that his employment was terminated on May 25, 2008. The delegate concluded that the Employee was employed at the Rocking Horse Pub for more than three months and therefore was entitled to the benefits outlined in section 63 of the *Act*.

4. The delegate next dealt with the issue of whether the Employee was fired from his job or quit. The Employer alleged that the Employee abandoned his job when he failed to call in to get his shifts after calling in sick. However, the delegate found that the Employer failed to bring forward evidence regarding the subjective and objective elements that are necessary for a quit to be established, i.e. there was no evidence that the Employee formed an intent to quit his employment and no evidence that the Employee carried out an act inconsistent with further employment. Further, the delegate had evidence before her that indicated the Employer intended to terminate the Employee's employment.

5. The delegate then went on to determine whether there was just cause for terminating the Employee's employment. The delegate reviewed the evidence and found there was neither a single incident that justified dismissal, nor sufficient proof that the Employee did not respond to corrective discipline. The delegate concluded that the Employee was entitled to one week's wages for compensation for length of service, and calculated the amount owing to the Employee to be $97.50 plus $3.90 in vacation pay for a total of $101.40. The delegate also found that an administrative penalty of $500 should be imposed on the Employer for contravening section 63.

The Decision

6. The Employer appealed the Determination on the ground that the Director failed to observe the principles of natural justice. The appeal was decided by a member of the Tribunal (the "Tribunal Member"). The Employer presented several reasons for appealing, among them the fact that no hearing was scheduled and the Employee presented no witnesses. The Employer also submitted that the evidence provided by one of its witness was disregarded. Upon reviewing the evidence that was before the Director and the submissions of the parties, the Tribunal Member found that there was no basis to conclude that the Director failed to observe the principles of natural justice. The Tribunal Member pointed out that section 76 and 77 of the *Act* do not require a hearing to be held, and that a hearing is not necessary for natural justice. The Tribunal Member was satisfied that the Employer knew the nature of the allegations it was facing and was given adequate opportunity to respond to those allegations. The Tribunal Member held that whether or not the Employer presented witnesses had no bearing on natural justice, and found no evidence that the Director disregarded any evidence put forward on behalf of the Employer.

The Reconsideration Request

7. Mr. and Mrs. Willoughby now seek to have the Decision reconsidered by the Tribunal. In their request for reconsideration, they reiterate their view of facts regarding the Employee's claim for gratuities and the termination of his employment. They also allege that the delegate of the Director was biased against them. Mr. and Mrs. Willoughby cite *Harrison (Re),* BC EST #D344/96 and request a review of the Decision under section 116.

ISSUE

8. When faced with an application for reconsideration, the Tribunal must consider two questions:

> 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 AND ANALYSIS

9. Section 116 of the Act provides the Tribunal with the power to reconsider decisions:

> (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
> > (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

10. It should be emphasized that the Tribunal reconsiders decisions only in very limited and exceptional circumstances. Reconsideration is not meant as an opportunity for a party to have its case re-heard where it is not satisfied with the outcome of an appeal. In *Milan Holdings Inc.* (BC EST #D313/98, reconsideration of BC EST #D559/97), the Tribunal outlined a two-stage analysis in determining whether a decision should be reconsidered. The first stage is to determine whether the matters raised by the appellant in the application merit reconsideration. In this regard, as stated in *Milan*:

> 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

11. The Tribunal's decision in *Zoltan Kiss*, BC EST #D122/96, noted a number of grounds on which a Tribunal ought to reconsider a decision:

- a failure by the Adjudicator to comply with the principles of natural justice;
- some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;
- some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

12. This is not an exhaustive list of the possible grounds for reconsidering a decision.

13. After weighing the factors relevant to the matter before it, the Tribunal may decide that the application is not appropriate for reconsideration, in which case it will usually give the reasons for its decision. On the other hand, if the Tribunal determines that one or more of the issues raised in the application is appropriate for reconsideration, it will proceed to review the merits of the application and make a decision.

14. I have carefully reviewed the Record and the Determination, the parties' submissions regarding the appeal of the Determination, the Decision, the reconsideration application, and the parties' reply submissions. I have concluded that reconsideration is not warranted in this case. There must be a significant question of law, fact, principle, or procedure for a reconsideration to be warranted and the submissions of Mr. and Mrs. Willoughby fail to raise any such significant question. The issues of compensation for gratuities and for length of service were canvassed and decided in the Determination. In the Decision, the Tribunal Member found that there was no basis for disturbing the conclusions in the Determination; the Employer had sufficient notice of the case against them and numerous opportunities to respond and to submit information to the delegate before the Determination was made. Similarly, Mr. and Mrs. Willoughby's claim that they were unjustly treated by the Employment Standards Branch, particularly the Director's delegate, was also before the Tribunal Member in their appeal of the Determination. The Tribunal Member found, after considering the materials, that there was no evidence that the delegate was biased. He concluded that there was no evidence of a failure on the part of the delegate, on behalf of the Director, to observe the principles of natural justice.

15. None of the issues raised by Mr. and Mrs. Willoughby leads to the conclusion that a reconsideration of the Decision is warranted. No analysis of the Decision on the merits is therefore necessary.

ORDER

16. Pursuant to Section 116(1)(b) of the *Act*, I order that Tribunal Decision BCEST #D119/08 dated December 11, 2008 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal