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/5

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 D008/13 (the "Original Decision"), regarding the complaint of Mariana C. Rosales ("Rosales").

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 Rosales. The Delegate found that a total of $29,271.44 in wages and interest was payable to the employees, of which $5,453.44 was found to be owed to Rosales. 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. Rosales advised the Delegate that she was employed as a server at the restaurant from October 11, 2009, until April 14, 2010. She alleged that the Employer owed her regular wages, overtime wages, vacation pay and statutory holiday pay. She asserted that the Employer had calculated her wages at an hourly rate that was lower than that they had agreed upon. She also submitted to the Delegate a spreadsheet on which she had set out the hours she had worked.

9. The Employer provided documents to the Delegate in support of its contention that Rosales had been paid all the wages due to her. The Employer advised, however, that its own timesheets and work schedules were inaccurate, and gave Rosales credit for more hours than she had, in fact, worked. Further, the principal of the Employer, Zora Ivanovska ("Ivanovska"), admitted that she had paid Rosales whatever Rosales had written on her timesheets, even though she knew that what Rosales had written was incorrect. Ivanovska stated that she had done so because employees were difficult to find in Dease Lake. Ivanovska produced for the Delegate new timesheets on which she had recorded the hours she believed that Rosales had actually worked.

10. In the Reasons for the Determination, the Delegate noted that the Employer's records were "rife with inconsistencies, contradictions and uncertainties" and so he could not rely on them. He determined that the best evidence with respect to Rosales' hours of work was the schedule that she had prepared. The Delegate observed that the records the Employer had submitted for Rosales were in a different format from those submitted for other employees, the signature for Rosales at the bottom of each sheet appeared to have been copied and applied to each page, and cheques for wages payable to Rosales had been prepared but never issued to her. The Delegate also doubted the Employer's assertion that it had paid Rosales' wages to her in cash, as the receipts for same it said she had signed were also in identical form, and contained signatures that also appeared to have been copied.

11. As for the discrepancy in Rosales' hourly wage rate, the Delegate accepted the higher rate asserted by Rosales, as it conformed to the rate described in a Labour Market Opinion issued prior to her coming to Canada.

12. On appeal, the Employer argued that the Delegate had failed to observe the principles of natural justice when he chose to resolve Rosales' complaint by way of an investigation. More specifically, it submitted that it was an error for the Delegate:

- to reject the Employer's evidence and accept Rosales' conflicting version of events without the benefit of an oral hearing;
- to criticize the state of the Employer's records when he knew that Rosales had full access to the Employer's payroll records while employed, but when she departed various of those records and other documents were found to be missing;
- to reject the Employer's evidence without giving sufficient reasons for doing so;
- to find that the Employer's evidence showing Rosales' signature was problematic, and then fail to put that concern to the Employer for a response;
- to have a concern that the records provided by the Employer were copies, rather than originals, and then choose not to put that concern to the Employer, or to ask it to provide the originals;
- to fail to request bank records from Rosales, which might have been relevant to show deposits of wages paid in cash.

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. The Member's reasons are captured in the following excerpts from the Original Decision:

> 33. I am not persuaded that the Director's decision to investigate the complaints rather than hold an oral hearing constitutes a failure to comply with natural justice. While there is no doubt that the evidence from both parties was wanting in terms of credibility, I am unable to conclude that the Director was under any duty to conduct an oral hearing in order to resolve any evidentiary conflicts or that her decision not to do so constitutes a denial of natural justice.

> 34. I am also not persuaded that the Director failed to scrutinize the evidence or give reasons for rejecting the Employer's evidence.
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> 35. Sections 27 and 28 of the *Act* require an Employer to maintain employment records, including hours of work and wage statements. Although those records were provided by the Employer, they were not only in disarray, as the Employer conceded, they were also wrong. The "correct" records were found to be unreliable by the delegate, for reasons specified in the Determination: they appeared fraudulent. Ms. Rosales' records were neither duplicated, nor, I infer, duplicitous. Given that it is the Employer's burden to both maintain records and to demonstrate that an employee has been paid, I find no basis for counsel's argument that the delegate was under a duty to convene an oral hearing. The delegate scrutinized the records of the Employer and Ms. Rosales, and rejected the records of the Employer for reasons he articulated in the Determination.

ISSUE

14. 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

15. 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.

16. 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.

17. 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*.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. The Employer states that by correspondence dated June 10 and 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*.

24. 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.

25. 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 an application.

26. 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.

27. 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.

28. 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's making 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 a quest for judicial review (see *BC Ferries* 2013 BCCA 497 p. 39-41; *Carriere* 1995 BCJ No 2927).

29. 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.

30. The Employer's submission on reconsideration identifies several 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.

31. On the application for reconsideration, the Employer raises its evidentiary concern 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.

32. Subsection 76(1) of the *Act* obliges 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.

33. 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.

34. 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.

35. It follows, and the Employer concedes, that the parties implicated 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. Rosales' complaint presents a scenario that is distinguishable from *Enviro* and *C&W*. No one on behalf of the Employer requested that the Delegate adjudicate the complaint by means of an oral hearing. The evidence before the Delegate was in conflict on the question whether Rosales had been paid for the periods

in question. As *Enviro* affirms, however, the presence of a credibility issue does not automatically require that the Director convene an oral hearing in order to resolve it. I infer from the Delegate's Reasons that he believed the conflict could be resolved, in the circumstances of the case, without an oral hearing. I cannot conclude that he was in error in drawing that conclusion.

41. The Delegate's Reasons demonstrate that he considered and weighed the evidence presented to him. The principal difficulty for the Employer was that it admitted its records were incorrect, and then sought, *ex post facto*, to submit re-constituted records it said should be relied upon by the Delegate.

42. The Delegate also gave reasons for determining that the Employer's evidence regarding the payments made to Rosales was unreliable. He said that the records the Employer had submitted for Rosales were in a different format from those submitted for other employees, the cogency of the signature for Rosales acknowledging her receipt of the wages was suspect due to the appearance of its being copied repeatedly, and cheques for wages payable to Rosales had been prepared but were never issued to her. Doubtless the Employer would not agree with those reasons, but they are reasons nonetheless.

43. I agree completely with the comments in the Original Decision to the effect that the onus of proving that wages have been paid rests on the Employer. Here, the Delegate determined that the evidence tendered by the Employer was inadequate to discharge that burden. That finding was based on a considered review of the evidence the Employer had presented. It was not perverse or inexplicable.

44. I find that the Delegate was not obliged to require that Rosales produce her bank statements to corroborate that she had not been paid her wages in cash. I see nothing in the record to indicate that the Employer ever suggested such an approach to the Delegate. Nor do I see any evidence indicating that if bank records had been produced, it was probable that they would have revealed whether the wages in question had been paid.

45. Nor am I persuaded that it was incumbent on the Delegate to ask for original documents after the Employer produced only copies. The Delegate did state that, while it was difficult to be certain upon a review of photocopies of the timesheets, it appeared that the same signature for Rosales had been copied and applied to each month's records. However, the Employer admitted that some, at least, of the records were not accurate, even though it had relied upon them when determining what should be paid to Rosales. It was for this reason, in part, that the Delegate said that a review of the Employer's records "raises more questions than it answers." In the circumstances, it is difficult to discern the extent to which the provision of originals would have assisted the Delegate to reach a substantively different result, but in any event it was for the Employer to produce the best evidence available in support of its case. The Employer failed to do that.

46. Neither the Reasons for the Determination, nor the Original Decision, appears to deal, explicitly, with the Employer's submission implying that its records were in disarray at least in part because Rosales had access to them, and some of them were missing when she left. Part of the reason for this may be that there was no evidence of substance submitted that would demonstrate it was Rosales who was to blame for the condition of the Employer's records. The Employer's implying that it was her fault was entirely speculative. Another reason may be that a significant portion of the records the Employer did produce were conceded to be inaccurate. I see no reason to disturb the Original Decision on this ground.

47. 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

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

Robert E. Groves
Member
Employment Standards Tribunal