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/7

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 D010/13 (the "Original Decision"), regarding the complaint of Andrew Creyke ("Creyke").

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 Creyke. The Delegate found that a total of $29,271.44 in wages and interest was payable to the employees, of which $4,168.84 was found to be owed to Creyke. 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. Creyke advised the Delegate that he was employed as a kitchen helper at the restaurant from September 1, 2009, until December 17, 2009, and that he had not been paid all his wages for that period. In support of his claim, he submitted copies of pay stubs for the wages he was, in fact, paid, and copies of his calendar pages setting out his hours of work during the time he was employed by the Employer. In his Reasons for the Determination, the Delegate raised a concern that Creyke's calendar records may not have been made contemporaneously with the work performed and "may have been set out on the calendar for the purposes of supporting his claim."

9. The Employer provided three pay stubs for Creyke and argued that they showed he had been paid all the wages owed to him for his work. Two of the stubs were identical to stubs produced by Creyke. The Employer delivered two copies of another stub. In his Reasons, the Delegate noted that the first was identical to Creyke's copy, but the second version contained a handwritten notation to the effect that the amount shown had been paid in cash, "along with a scrawl which may or may not be Mr. Creyke's signature."

10. The Employer also supplied a pay statement and another sheet showing other hours worked. Each contained further notes acknowledging payment in cash, together with what the Delegate described as "a slightly different scrawl" or, simply, a "scrawl." On the latter document the Delegate noted that the number of hours appeared to have been added after the fact.

11. One of the schedules provided by the Employer contained a reference to November 31, 2009, a date which did not exist. Two of the other schedules submitted were for the same work period, but one contained hours of work and the other did not. The Employer also submitted work schedules for another time period which showed two different calculations of hours for Creyke. Yet another schedule revealed hours of work for Creyke that were not recorded in Creyke's records.

12. In his Reasons, the Delegate noted that the Employer's records were "rife with inconsistencies, contradictions and deficiencies" and could not be relied upon. While the Delegate had concerns about Creyke's records, he found that they constituted "the most reliable evidence" of the hours he had worked and the wages he had received.

13. On appeal, the Employer argued that the Delegate had failed to observe the principles of natural justice when he chose to resolve Creyke's 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 Creyke's conflicting version of events without the benefit of an oral hearing, particularly where the Delegate expressed concerns about the probative value of Creyke's evidence;
- to reject the Employer's evidence without giving sufficient reasons for doing so;
- to identify an issue whether the "scrawl" under the acknowledgements of payments in cash was Creyke's signature, and then fail to make a finding regarding the matter.

14. 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 stated:

> 34. 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 less than reliable, 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.
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> 35. 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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> 36. 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 in disarray, as the Employer conceded. The Employer submitted records that were duplicates, contained erroneous and non-existent dates and conflicted with other records. The delegate rejected the Employer's documents because they were "rife with inconsistencies,

> contradictions and deficiencies" and set out examples of those problems. I find no error of law in his reasoning. Faced with documents from both parties that were less than satisfactory, the delegate nevertheless had to decide whether or not the Employer had paid Mr. Creyke his full wages. Although the delegate was concerned as to whether or not Mr. Creyke's records were made contemporaneously, he nevertheless found Mr. Creyke's evidence more reliable. While I agree it might have been helpful, for example, if the delegate had provided more robust reasons for preferring Mr. Creyke's records, I am not able to find the delegate erred by not resolving any concerns he had by way of an oral hearing. Furthermore, while I also agree it would have been prudent for the delegate to have asked Mr. Creyke whether or not the "scrawl" on the Employer's documents was his, given the general unreliability of the Employer's documents for all employees, I am not persuaded that he erred in rejecting the Employer's documents entirely.

ISSUES

15. 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

16. 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.

17. 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.

18. 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*.

19. 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.

20. 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.

21. 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.

22. 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.

23. The Employer submits that the reason for the delay in the filing of 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.

24. 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*.

25. 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.

26. 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

27. 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.

28. 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.

29. 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).

30. 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.

31. 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.

32. On the application for reconsideration, the Employer raises its evidentiary concern in the following terms, relying in part on the authority of *Ce&W Salvage Ltd.*, BC EST # D103/12:

> ...the employer submits that when there are issues of credibility and in cases where the documents give an incomplete picture, and especially in cases such as the Creyke matter where the Delegate has outright concerns regarding the reliability of a complainant's evidence, 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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> In fact, the Creyke matter is exactly on point with *Ce&W Salvage* as the Delegate directly expressed concerns with the reliability of Mr. Creyke's calendar but then, without explanation, made the Determination on the basis of documents alone.
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> In the matters in issue here, neither the Delegate nor the Tribunal engaged in a judicial analysis and simply stated the rote position that there is no absolute right to an oral hearing. This is an error in law, a denial of natural justice, and a failure to consider the *Ce&W Salvage* precedent.

> The Employer submits that the instant matters fall squarely within the principles established by *C&W Salvage* and that, 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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*, *supra*). 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.

38. 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.

39. 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.

40. 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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> ...

> 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.

41. Creyke's 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 Creyke 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.

42. The Delegate's Reasons demonstrate that he considered and weighed the evidence presented to him. The Delegate also gave reasons for determining that the Employer's evidence regarding the payments made to Creyke was unreliable. That evidence is summarized in the discussion of the Delegate's Reasons, and the statements quoted from the Original Decision that I have set out above, and which I need not repeat here.

43. 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, as well as the evidence presented by Creyke. The Delegate was entitled to weigh all aspects of the evidence presented, and to reject all, or parts of it, having regard to the circumstances, and the "preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions..." (see *Faryna v. Chorny* (1952) 2 DLR 354 (BCCA)).

44. While the Delegate expressed a concern about Creyke's record-keeping, the Delegate also determined that the Employer's records could not be relied upon as they were "rife with inconsistencies, contradictions and deficiencies", and that Creyke's records were the most reliable evidence regarding his hours of work and the wages he received. Put more bluntly, the Delegate rejected the Employer's evidence, and accepted Creyke's, for the reasons given. In my opinion, those findings of fact were not perverse or inexplicable. It follows that since the onus was on the Employer to prove that Creyke had been paid all the wages to which he was entitled for his work, it was not incumbent on the Delegate, in the circumstances, to conduct a hearing in order to satisfy himself concerning the amount that the Employer owed.

45. 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

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

Robert E. Groves
Member
Employment Standards Tribunal