Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Francois Lambert operating as Soprano's International Oyster Bar & Grill
("Lambert")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2005A/9

DATE OF DECISION: March 21, 2005

DECISION

SUBMISSIONS

David L. Stratmoen	Counsel for Francois Lambert
David A. Paul, Q.C.	Counsel for Steven Paul

INTRODUCTION

This is an application filed by Francois Lambert, carrying on business as "Soprano's International Oyster Bar & Grill" ("Lambert"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Member's decision issued on November 30th, 2004 (B.C.E.S.T. Decision No. D199/04).

The Member confirmed a Determination that was issued by a delegate of the Director of Employment Standards on August 6th, 2004. Accordingly, as matters now stand, Mr. Lambert has been ordered to pay his former employee, Steven Paul ("Paul"), the sum of $27,308.80 on account of unpaid wages and accrued section 88 interest (calculated as of August 6th, 2004) and, in addition, a further $1,000 to the Director of Employment Standards on account of two $500 administrative penalties.

THE PARTIES' POSITIONS

Mr. Lambert's request for reconsideration was filed on January 21st, 2005. In essence, Mr. Lambert submits that the Member's decision should be set aside and that a new appeal hearing be ordered. Mr. Lambert's reconsideration application is grounded on two separate, but somewhat related, arguments. First, counsel for Mr. Lambert says that the appeal should not have been adjudicated solely on the basis of the parties' written submissions. Rather, the appeal should have been adjudicated only after an oral evidentiary hearing was conducted. Second, and in light of the fact that Mr. Paul's record of hours worked was never properly tested through cross-examination, and in light of certain other evidence, the Member should not have accepted Mr. Paul's records as a reliable record of his actual hours worked.

Counsel for Mr. Paul submits that the reconsideration application should be summarily dismissed as untimely. Further, he says the application should be dismissed as an undisguised attempt to have the Tribunal simply "re-weigh" evidence that has already be considered by the Member. He says that no clear adjudicative error has been demonstrated.

As communicated to the parties in the Tribunal Vice-Chair's letter of March 3rd, 2005, this application is being decided based on the parties' written submissions. In that latter regard, I have before me Mr. Lambert's reconsideration form and an attached 1-page summary of his position and a submission from Mr. Paul's legal counsel dated February 10th, 2005. The Director, despite being invited to do so, did not file a submission with the Tribunal regarding this application. I also have before me the complete record that was before the Member as well as his written reasons for decision.

FINDINGS AND ANALYSIS

Timeliness of the Reconsideration Application

The Member's decision was issued on November 30th, 2004 and, some 7 1/2 weeks later, the present application was filed. Based on the material I have before me, it would appear that counsel for Mr. Lambert initially filed an application for judicial review of the Member's decision only to be subsequently advised by counsel for the Attorney General (by telephone on January 17th and then in writing on January 19th, 2005) that a reconsideration option was open under section 116 of the *Act.*

The time frame between the issuance of the Member's decision and the filing of this application spans the Christmas holiday season when many offices are closed for the better part of a week. If counsel had initially filed a section 116 reconsideration application rather than an application for judicial review, the 7 1/2 weeks' delay would have obviously been reduced but perhaps only by a few weeks. Finally, even without these mitigating factors, I do not consider that the delay in this case is so egregious as to justify summarily dismissing the application without any consideration of its underlying merit.

Counsel for Mr. Paul submits that Mr. Paul has been prejudiced since his ability to collect on the Determination is being actively frustrated by Mr. Lambert. However, I do not consider that argument to be meritorious given that Mr. Paul is fully entitled to pursue enforcement proceedings while this application is being adjudicated since, so far as I can determine, the Determination has never been suspended by either the Tribunal (see section 113 of the *Act*) or court order.

I am satisfied that this application is timely and, further, that it raises a serious question worthy of further consideration (see *Milan Holdings Ltd*., B.C.E.S.T. Decision No. D313/98).

Was an Oral Appeal Hearing Required?

The Tribunal is not required to hold an oral hearing although it certainly may do so in an appropriate case (see section 103 of the *Act* which incorporates section 37 of the *Administrative Tribunals Act*). Counsel for Mr. Lambert says that the Tribunal erred "in observing the rules of equity and natural justice in refusing to allow an oral hearing" of the appeal.

In his appeal form, Mr. Lambert requested an oral hearing on the basis that the appeal would turn on the comparative credibility of the two parties, namely, Messrs. Lambert and Paul. The Member was very much alive to this latter concern. However, as is clear from a review of his reasons, both parties accepted that the record before the Member was complete. Further, the appeal did not turn on determining which contested version of the facts was accurate; rather, the appeal largely turned on the proper legal conclusions to be drawn from essentially uncontested facts. It would appear that neither party sought to introduce "new" facts for the Member's consideration. Mr. Lambert did *not* appeal the Determination on the ground that he had new evidence that was not available when the Determination was being made [section 112(1)(c)].

Mr. Lambert's main argument before both the delegate and the Member was that the parties were partners rather than employer/employee. The delegate rejected Mr. Lambert's submission on this point and that decision was confirmed (and, in my view, correctly) by the Member. Mr. Lambert does not challenge, by way of this application, the correctness of the Member's decision regarding the "employment versus partnership" issue.

As for the matter of determining Mr. Paul's wages, the delegate relied, in large measure, on Mr. Paul's time records since Mr. Lambert did not maintain (contrary to his obligations under the *Act*) proper payroll records (and certainly no time records) regarding Mr. Paul. Counsel submits that the credibility of Mr. Paul's records (which Mr. Lambert asserted were "grossly inflated") could only be properly assessed after he was cross-examined at an oral hearing.

Mr. Paul was awarded wages reflecting a 6-month period from August 16th, 2003 to February 16th, 2004 at a wage rate of $15 per hour. He claimed to have worked 1717 hours (approximately 70 hours per week) during this period. The $15 per hour wage rate was confirmed by documentary evidence within the employer's possession and control. Mr. Paul's hours were recorded on a calendar that he maintained; his start and finish times were recorded for each day.

Mr. Paul was involved in managing a restaurant; his time records indicate that he typically worked long days (often from 11 AM to 10 PM) and rarely took any days off. Although Mr. Lambert claimed that Mr. Paul's time records were inflated, Mr. Lambert did not submit any evidence of his own as to Mr. Paul's actual working hours. The main thrust of Mr. Lambert's case on appeal was that he should be credited for certain payments allegedly made to Mr. Lambert--the Member properly rejected those arguments for want of evidence or for legal grounds (e.g., section 21 of the *Act*).

The Member heard and considered an argument that the delegate erred in finding certain facts, particularly with respect to Mr. Paul's working hours. However, the Member quite rightly noted that findings of fact cannot be overturned simply because they are being challenged; Mr. Lambert failed to show that the findings of fact made by the Member lacked any evidentiary foundation.

The only reason why an oral appeal hearing might have been appropriate would be to allow Mr. Lambert to lead the sort of evidence that he failed to present to the delegate regarding the reliability or accuracy of Mr. Paul's time records. However, available evidence that could have (and should have) been presented to the delegate is not admissible on an appeal to the Tribunal [see section 112(1)(c)]. Thus, an oral appeal hearing would not have be a viable mechanism to rescue Mr. Lambert from his original failure to properly document his case before the delegate.

Mr. Paul's Unpaid Wage Entitlement

Counsel for Mr. Lambert asserts that both the delegate and the Member "erred in apparently accepting without question the veracity of the hours that Mr. Paul claimed to have worked". Counsel says that the Member overlooked evidence that Mr. Paul was sleeping on the job. However, I do not consider this to be a case where records were accepted "without question"; rather, Mr. Paul's records represented, in the absence of any contrary evidence, the best evidence regarding Mr. Paul's working hours. Mr. Paul's records were not accepted in their entirety.

As noted by the Member in his reasons, the delegate generally accepted Mr. Paul's records as a "fair assessment" of his working hours and, in addition, that assessment was not contradicted by the employer's evidence. If Mr. Paul was sleeping on the job, that matter should have been more fully argued and corroborated before the delegate. I might add, as a further point, if Mr. Paul was sleeping on the job, one has to wonder why the employer allowed that situation to persist without taking any disciplinary action.

In sum, I adopt the following comments of the Member:

> While counsel for Lambert asserts the number of hours Paul claimed as time worked was "grossly inflated", that assertion is not supported by anything in the appeal or the record and represents nothing more than a disagreement with the decision of the Director. Nothing in the record or in the appeal shows the Director's view of the facts was one which could not reasonably be entertained on all of the evidence submitted.

In light of the foregoing comment, in my view, this application must be dismissed.

ORDER

The application to vary or cancel the decision of the Member in this matter is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal