

An application for Reconsideration

- by -

Patara Holdings Ltd. carrying on business as Best Western Canadian Lodge
and/or Canadian Lodge
("Patara")

- 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: Carol Ann Hart

FILE No.: 2008A/17

DATE OF DECISION: May 13, 2008

DECISION

SUBMISSIONS

Major Patara	on behalf of Patara Holdings Ltd., carrying on business as Best Western Canadian Lodge and/or Canadian Lodge
Alan Phillips	on behalf of the Director
Ken Blackmore	on behalf of Jennifer Blackmore and Ken Blackmore

OVERVIEW

1. Patara Holdings Ltd., carrying on business as Best Western Canadian Lodge and/or Canadian Lodge (“Patara”) seeks a reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a Decision of the Employment Standards Tribunal BC EST #D010/08, dated January 29, 2008 (the “Original Decision”).
2. In the Original Decision, the appeal filed by Patara was dismissed on the basis that the appellants had not filed the appeal within the time permitted. The Tribunal confirmed the Determination made by a Delegate of the Director of Employment Standards (the “Delegate”) on October 12, 2007 (the “Determination”) that Patara owed Ken Blackmore and Jennifer Blackmore wages in the amount of \$10 937.74.
3. The Original Decision also confirmed the Determination in respect of the four administrative penalties of \$500.00 each under section 29 of the *Employment Standards Regulation*, B.C. Reg 396/95 (the “Regulation”), which were assessed against Patara for contraventions of sections 16, 28, 40 and 46 of the *Act*.

ISSUES

4. There are two issues in this reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If it does, should the decision be cancelled, varied, or sent back to the Member?

BACKGROUND

5. According to undisputed facts, as set out in the Determination, Ken Blackmore and Jennifer Blackmore were hired by Patara as resident managers of a motel located in Valemont, B.C. They worked there from July 6, 2005 to August 31, 2006. Mr. and Mrs. Blackmore subsequently filed complaints alleging that Patara had failed to pay amounts owing to them under the *Act*.

6. In the Determination, the Delegate considered the matter of whether Mr. and Mrs. Blackmore were managers, as defined in section 1 of the *Regulation*, and concluded that they were not. The Delegate then went on to find that Mr. and Mrs. Blackmore were not paid minimum wage for the hours they had worked; and that they were entitled to amounts owing for vacation pay, working over time, work performed on statutory holidays, and interest accrued on the amount found to be owing. The Delegate ordered Patara to pay four administrative penalties of \$500 each for its contraventions of sections 16, 28, 40 and 46 of the *Act*.

ARGUMENT

For the Appellants

7. In the Reconsideration Application Form dated February 15, 2008, Mr. Patara questioned the matter of how a decision could be reached without asking about a witness. He also questioned what proof there was concerning Mr. Blackmore's number of hours worked.
8. In his submission dated March 7, 2008, Mr. Patara raised allegations that Mr. and Mrs. Blackmore had failed to remit amounts owing to the Canada Revenue Agency with respect to the restaurant they managed for Patara. Mr. Patara wrote that the Canada Revenue Agency had advised him that Patara was required to pay \$23 000 for the amounts which were not remitted, penalties, and interest. It was further noted by Mr. Patara that he believed that Mr. and Mrs. Blackmore possessed the amounts which should have been remitted, and he would be launching an investigation into that matter.
9. In his final submission (undated) which was received by the Tribunal on April 16, 2008, Mr. Patara provided further detail concerning the allegations regarding the failure of Mr. and Mrs. Blackmore to remit the amounts owing to the Canada Revenue Agency. He wrote that if Mr. and Mrs. Blackmore had not quit, they would have been "*fired with cause*".

For the Director

10. The Delegate submitted that there was no compelling reason to grant the request for reconsideration. The appellants had been given the opportunity to respond to the allegations, and the arguments of the appellants had been considered.
11. With respect to the new evidence submitted with the appeal, the Delegate maintained that the appellants could have provided this evidence during the investigation. The Delegate submitted that the result set out in the Determination would not have been different even if the new evidence had been presented to the Delegate during the course of the investigation.

For Mr. and Mrs. Blackmore

12. In his written submission dated March 25, 2008, Mr. Blackmore replied to some of the issues raised by Mr. Patara in his submissions. He further wrote that he considered the allegations made by Mr. Patara to be "*unsubstantiated*", "*libellous and slanderous*".

ANALYSIS

13. The *Act* confers an express reconsideration power on the Tribunal. Section 116 provides:
- (1) On application under subsection (2) or on its own motion, the tribunal may
 - (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.
14. In *Milan Holdings Ltd*, BC EST #D313/98 the Tribunal set out a two-stage process for making decisions concerning its exercise of the reconsideration power. The first stage is for the Tribunal to decide whether the matters raised in the application in fact warrant reconsideration.
15. In determining this question, the Tribunal will consider a number of factors including: (a) whether the reconsideration application was filed in a timely fashion; (b) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (c) whether the application arises out of a preliminary ruling made in the course of an appeal; (d) 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; (e) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
16. The Tribunal outlined a non-exhaustive list of circumstances in which an application for reconsideration will be successful in several decisions beginning with *Re Zoltan Kiss* [1996] BC EST D # 129 (QL). These grounds include:
- a) The member fails to comply with the principles of natural justice;
 - b) There is a mistake in stating the facts;
 - c) The decision is not consistent with other decisions based on similar facts;
 - d) Some significant and serious new evidence has become available that would have led the member to a different decision;
 - e) A serious mistake was made in applying the law;
 - f) A significant issue in the appeal was misunderstood or overlooked; and
 - g) The decision contains a serious clerical error.
17. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. (See *Re Ekman Land Surveying Ltd.*, [2002] BC EST D#413 (QL), and *Voloroso* (BC EST #RD046/01)). It was not intended that the reconsideration process would give parties another opportunity to re-argue their case.
18. The Member deciding the appeal (the "Member") carefully considered the reason given by Mr. Patara for the late filing of the appeal. Mr. Patara had indicated in his submission for the appeal that he had sent the documents on November 19, 2007 after talking to the local office in Kamloops. When he had learned that they had to be sent to Vancouver, he sent them on December 10, 2007.

19. The Member correctly set out in the Original Decision that the burden was on the appellant to show that compelling reasons exist for the Tribunal to extend the time for filing an appeal. (See *Matty Tang*, BC EST #D211/96 and *Niemisto*, BC EST #D099/96). He then outlined and considered the following criteria for applications for an extension of time to file an appeal as set out in *Re: Denill (c.o.b. Fibremaster Restorations & Carpet)*, BC EST #D080/01:
1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 2. There was a genuine and ongoing *bona fide* intention to appeal the Determination;
 3. The respondent party as well as the Director was aware of this intention;
 4. The respondent party will not be unduly prejudiced by the granting of the extension.
 5. There is a strong *prima facie* case in favour of the appellant.
20. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.
21. It was noted by the Member that it was not necessary for the Tribunal to find that the appellant had met all of the criteria in order to be granted an extension of time to file the appeal. Rather, the Tribunal would weigh the evidence presented on all of the criteria and do a “balancing act” in making a final determination on the issue.
22. The Tribunal did indeed carefully weigh all of the evidence, and in so doing, concluded that the evidence adduced by the parties concerning the first four of the criteria delineated in the *Dennill* case was “not determinative” on the issue of whether or not the extension of time to file the appeal should be granted. It was the evidence regarding the fifth criterion (There is a strong *prima facie* case in favour of the appellant) which was found to be determinative.
23. In deciding whether Patara had shown evidence of a strong *prima facie* case, the Member found that Patara had failed to meet the burden of demonstrating this with respect to the ground of appeal advanced by Patara that it had been denied natural justice. The Member noted that Patara had not made any submissions in support of its assertion that there had been a denial of natural justice. Further, the Member found that there was “ample evidence” on the record that showing that the Delegate had given notice of the complaints and opportunities to reply to the complaints, but Patara had not taken the opportunity to reply to the Delegate or make submissions.
24. The Member also decided that Patara had not established that it had a strong *prima facie* case with respect to the ground of appeal that there was new evidence which was not available at the time the Determination was made. In Patara’s submissions on appeal, it outlined three types of new evidence it wished to provide on appeal.
- (a) Evidence showing that Ken Blackmore was working at another job at the same time as he was working for Patara;
 - (b) Cheques “signed by Mr. Blackmore from the restaurant he was running” at the same time he was working for Patara;
 - (c) Witness evidence to show that Mr. Blackmore did not work the hours he claimed in the complaint.

25. The Member wrote as follows at page 7 of the Decision:

What is curious is that Patara is suggesting that it has the above “new evidence” but neither produces the alleged evidence in the appeal nor explains why it did not produce it during the investigation of the Complaints by the Delegate when it was offered numerous opportunities to make submissions. Further, the nature of the “new evidence” Patara says it now has appears to be evidence that Patara could have produced during the investigation of the complaint and frankly, even if Patara had actually produced such evidence in its appeal, it would fail to meet the test for admitting new evidence delineated in *Re: Merilus Technologies Inc.* [2003] BC ESTD No. 171(QL) and *Re: Bloomberg Biotechnology Development Ltd.* [2007] BC ESTD No. 37 (QL) because it is the type of evidence that could have been produced during the investigation of the Complaints.

26. It is uncontested that, for some reason, Patara stopped participating in the Delegate’s investigation of the complaints. The Delegate made repeated requests for Patara to provide information, but received only the pay statements for Mr. and Mrs. Blackmore. The Tribunal has consistently not allowed parties to adduce evidence on appeal that should have properly been before the Delegate (See *Re Tri-West Tractors Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97). I can find no reason to interfere with the Member’s conclusion that the evidence Mr. Patara sought to submit on appeal would fail to meet the test for new evidence, and Patara did not have a strong *prima facie* case based on the new evidence ground of appeal.

27. With respect to this Request for Reconsideration, Patara provided the following documentation in addition to the written submissions filed by Mr. Patara:

1. Payroll records and Canada Revenue Agency documents regarding employee remittances;
2. A statement dated April 16, 2008 from Lianne Franklin, the former chef at the Canadian Lodge Restaurant;
3. A document dated July 31, 2005 entitled “Work Agreement” between Ken and Jennifer Blackmore and The Canadian Lodge Hotel.

28. The Tribunal may allow the introduction of evidence on reconsideration in certain circumstances. However, at a minimum in order to be successful on a reconsideration application, the party wishing to introduce such evidence must outline how such evidence may change the original decision. (*Re Dusty Investments c.o.b. Honda North*, BC EST #D171/99 (Reconsideration of BC EST #D101/98)). The evidence must also be “new” in that it was not available at the time the Determination or the Appeal Decision was being made. No explanation was provided by Mr. Patara as to why the documentation he sought to introduce with respect to the Application for Reconsideration had not been provided before the Determination was made, or for the appeal. It was also not established that the evidence provided for the reconsideration would have changed the Original Decision.

29. Although Mr. Patara notes that there is witness evidence, he does not indicate who the person or persons are or what their evidence might be. Simply asserting that there may be a witness who could give some evidence on some point does not establish a basis for reconsideration.

30. Patara has not established any circumstances that would persuade me to allow it to introduce evidence on reconsideration that it failed or refused to provide to the Director during the investigation.

31. In summary, the request for reconsideration fails in the first stage of the two-stage analysis referred to in *Milan Holdings, supra*. Therefore, it is not necessary for me to pursue the analysis in the second stage—that is, consider the merits of the application.
32. For the above reasons the reconsideration application is dismissed.

ORDER

33. I order pursuant to section 116 of the *Act* that the Original Decision dated January 29, 2008 be confirmed with interest to be calculated to date.

Carol Ann Hart
Member
Employment Standards Tribunal