

An Application for Reconsideration

- by -

Nirmal S. Randhawa
a Director or Officer of Dine Enterprises Ltd. carrying on business as Louie's Sub
("Mr. Randhawa")

- 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.: 2010A/37

DATE OF DECISION: June 18, 2010

DECISION

SUBMISSIONS

Nirmal S. Randhawa	on his own behalf
Joy Archer	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application for reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of BC EST # D114/09, which was issued on November 9, 2009 (the “Original Decision”).
2. The Original Decision of the Tribunal concerned an appeal filed by Mr. Randhawa of a Determination issued by the Director against him as a Director or Officer of Dine Enterprise Ltd., carrying on business as Louie’s Sub. In the Determination, Nirmal S. Randhawa, a Director and Officer of Dine Enterprise Ltd, c.o.b. as Louie’s Sub was found to be personally liable for the payment of wages and interest in the amount of \$3870.09 to a former employee, Jackie Boucher, and four administrative penalties of \$500.00 each, in the total amount of \$2000.00.
3. The Original Decision confirmed the Determination made by a Delegate of the Director of Employment Standards (the “Delegate”) on August 6, 2009 (the “Determination”).

BACKGROUND

4. After conducting an investigation, the Delegate issued a Determination dated March 31, 2009, against Dine Enterprises Ltd., carrying on business as Louie’s Sub, in which she found that wages were owing and assessed the administrative penalties. No appeal of that Determination was filed.
5. The Delegate subsequently issued the Determination (dated August 6, 2009) against Nirmal S. Randhawa personally. Mr. Randhawa was a Director or Officer of Dine Enterprises Ltd., carrying on business as Louie’s Sub at the time the wages were earned or should have been paid. On this basis, the Delegate found that Mr. Randhawa was personally liable for up to two months of Ms. Boucher’s unpaid wages. The Delegate further found that Mr. Randhawa authorized, permitted or acquiesced in the contraventions of the *Act*, and was consequently personally liable to pay the administrative penalties.
6. On appeal, the Member found that the appellant had failed to discharge the burden of establishing an error in the Determination, and more specifically, it was not shown that the Delegate had failed to observe the principles of natural justice in making the Determination.

ISSUES

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

ARGUMENT

For the Applicant

8. Mr. Randhawa wrote that he now wished to pay the amount of the tentative settlement which had been discussed before the Determination was issued. He explained that he had been laid off from work, and had suffered a relapse of his medical condition. Mr. Randhawa wrote that he had “*a long psychiatric history of depression, and ... could only cope with activities of daily living with the support of [his] family and friends*”. He added that it would cause great hardship to him and his family if he had to pay the full amount assessed by the Director including the penalties.
9. In his submissions for this reconsideration (undated), which were received by the Tribunal on May 14, 2010, Mr. Randhawa wrote as follows:

Although others may have spoken to the Delegate during the investigation, I was at all times responsible for the business and unfortunately my condition meant that my judgment was impaired at the time. I have a doctor's note to say that I was suffering depression at the time and was on medication. If it were not for this condition I would have agreed to the \$1200 settlement and paid it. I agree that I should pay something, however it is a great hardship on me in my present condition to pay the whole amount. I think a settlement is fair because it takes into account that the employee herself was told I could not afford to pay overtime but she insisted on working for straight time because she needed the hours. Again I would say that in agreeing to this arrangement my judgment was impaired by my condition. I think it would be discriminatory and unfair of the Appeal Tribunal to ignore this condition as a factor. Only a person who has been through depression could understand why a person might make poor decisions or forget to pay a settlement. Please let me put this behind me in a way I can afford. Any continued collection action is going to make things worse.

10. Mr. Randhawa provided a note from his physician with the submission he sent to the Tribunal on May 14, 2010.

For the Director

11. The Delegate maintained that there was no compelling reason to grant the request for reconsideration.
12. Mr. Randhawa chose not to continue with efforts made to settle the matter, and the verbal agreement made by the parties was never put into writing or upheld because Mr. Randhawa refused to co-operate.
13. The Delegate contended that Mr. Randhawa's medical condition was not a relevant issue for this reconsideration. During the investigation process, neither Mr. Randhawa nor his son Balbir (“Baz”) Randhawa (who was representing him), had ever contacted the Delegate to request more time due to Mr. Randhawa's medical condition.
14. The Delegate further maintained that Mr. Randhawa's financial situation did not constitute relevant or sufficient grounds for reconsideration.
15. The Delegate wrote that the Director acknowledged that Mr. Randhawa's situation was tragic and unfortunate for him and his family. However, she submitted that this did not change the findings of fact as laid out in the Determination, and did not constitute sufficient grounds for reconsideration by the Tribunal.

ANALYSIS

16. The *Act* confers an express reconsideration power on the Tribunal in section 116, which provides as follows:
- (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, cancel, or vary the order or decision or refer the matter back to the original panel or another panel.
17. In *Milan Holdings Ltd.*, BC EST # D313/98, the Tribunal set out a two-stage process governing its decision to exercise the reconsideration power. First, the Tribunal must decide whether the matters raised in the application, in fact, warrant reconsideration. In the second stage of the analysis, the Tribunal renders a decision on the merits of the application.
18. In determining whether reconsideration is warranted, the Tribunal will consider a non-exhaustive list of factors which include the following: (i) whether the reconsideration application was filed in a timely manner; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; and (iv) 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. (See *Joyce Middleton operating as Reflexology and Stress Clinic*, BC EST # RD126/06, and *Ivan Gaspar*, BC EST # RD037/08).

i) Timeliness of the Application for Reconsideration

19. The application for reconsideration was filed on March 9, 2010. There is no time limit specified in the *Act* for bringing an application for reconsideration. However, Rule 22(3) of the Tribunal's *Rules of Practice and Procedure* provides that reconsideration applications should be filed within 30 days.
20. When an application for reconsideration is brought more than 30 days after the date of the Tribunal decision, the applicant is required to provide written reasons for the delay pursuant to Rule 22(4). In this case, the application for reconsideration was brought approximately four months after the Determination was issued. Mr. Randhawa provided the following reasons for the delay in filing his application for reconsideration:
- I have over the past 18 months been troubled with many stresses. Not only have I had a great loss with me losing my business, I got laid off from work. My debts were building up, and as a result found myself relapsing in my mental illness.
21. In *British Columbia (Director of Employment Standards)*, BC EST # RD530/00, the Tribunal determined that an untimely application for reconsideration may be rejected even where there is no finding of prejudice as a result of the delay. In that case, the Tribunal found that an unexplained delay of six (6) months was unreasonable.
22. Applications made four (4) months after the Tribunal's decision on appeal were considered in *Westburn Industrial Enterprises Ltd. (c.o.b. Nedco)*, BC EST # RD233/02, and *Omobosola Owolabi (c.o.b. Just Beauty)*, BC EST # RD193/04. In both of these cases it was noted that the arguments on the merits were not significantly different from those made throughout the dispute, and the delay of four months in filing an application for reconsideration was found to be unreasonable.

23. Mr. Randhawa's application for reconsideration was filed well beyond the 30 day period set out in the *Rules of Practice and Procedure*, and he explained that this was due to the unfortunate personal circumstances set out above. However, even if the application had been filed in a timely manner, or the delay was excused for valid reasons, the application would still fail the first stage of the analysis set out in the *Milan Holdings Ltd.* decision for the reasons set out below. Timeliness is only one of the factors which should be taken into consideration when determining whether the Tribunal should grant an application for reconsideration.
- ii) Is the applicant's primary focus on reconsideration to have the Member essentially "re-weigh" evidence already provided during the investigation, or on appeal?**
24. Reconsideration is not intended to provide an opportunity to re-argue issues which have previously been raised or to present evidence or arguments which should have been raised with the Delegate.
25. The arguments Mr. Randhawa raised concerning his financial situation were addressed on appeal. The Member correctly determined that he did not have jurisdiction to consider as relevant, the ability of the employer to pay an amount owing under a Determination.
26. Mr. Randhawa wrote his submissions that his judgment was impaired, and if it were not for his medical condition, he would have paid the \$1200.00 settlement which had been discussed between the parties. He also wrote that he had told Ms. Boucher that he could not afford to pay overtime, but she "*insisted on working for straight time*" because she needed the hours. Mr. Randhawa indicated that in agreeing to this arrangement his judgment was impaired by his condition. His depression had caused him to "*make poor decisions*" and to "*forget to pay a settlement*".
27. The arguments raised by Mr. Randhawa on reconsideration concerning his medical condition should have been brought forward to the Delegate before the Determination was issued. The medical note submitted as evidence for this reconsideration application indicates that Mr. Randhawa has been taking medication for his condition for 15 years. This is not a situation in which the applicant's medical condition has only recently become apparent.
28. The medical note submitted is insufficient to establish that Mr. Randhawa's medical condition caused him to make poor decisions or impaired his judgment. There was no other evidence provided to support Mr. Randhawa's assertions concerning the effects of his medical condition.
29. In the Determination, at page 3, the Delegate wrote about the extensive efforts she had made to communicate with Nirmal S. Randhawa and his son Baz, who had represented the employer during the investigation, at his father's request. A review of the Record further demonstrates that the Delegate was diligent, frank and open with both Baz Randhawa and Nirmal S. Randhawa in explaining, and ensuring that they understood, the personal liability of Nirmal S. Randhawa under the *Act* as a result of Ms. Boucher's complaint.
30. Situations may arise in which an individual is mentally incapacitated, and is consequently unable to raise that medical condition as an issue during the investigative or adjudicative process. In this case, however, the evidence provided falls far short of establishing that Mr. Randhawa's medical condition resulted in any form of mental incapacity or impairment, or that it otherwise interfered with the investigative process leading up to the Determination.

iii) Has the applicant raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties or their implications for future cases?

31. The Tribunal may agree to reconsider a decision for a number of reasons, which may include the following, as set out in *Zoltan Kiss*, BC EST # D122/96:
- A failure to comply with the principles of natural justice;
 - A mistake of fact;
 - The decision is not consistent with other decisions based on similar facts;
 - Some significant and serious new evidence has become available that would have resulted in a different decision;
 - A serious mistake was made in applying the law;
 - A significant issue in the appeal was misunderstood or overlooked; and
 - The decision contains a serious clerical error.
32. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. In *Voloroso*, BC EST # RD046/01, and other decisions, the Tribunal has emphasized that limited use of the reconsideration power is necessary with the expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
33. With respect to new evidence, Mr. Randhawa raised his medical condition in his reconsideration arguments, and provided a note from his physician dated May 6, 2010. The brief handwritten doctor's note sets out only the nature of Mr. Randhawa's illness, the name of his medication, and the fact that he has been taking the medication for 15 years. Mr. Randhawa did not provide any explanation as to why he had not advised the Delegate of his medical condition during the investigation, or requested any accommodation he might have required. He also did not indicate why the medical note was not available during the investigation or on appeal.
34. There was no further medical or other evidence submitted to demonstrate that the medical condition in question would have had an effect on the outcome of the Determination or the Original Decision. Furthermore, the Delegate dealt with both Mr. Randhawa and Mr. Randhawa's son, Baz, whom Mr. Randhawa had authorized to act on his behalf.
35. In summary, I have concluded that Mr. Randhawa's application does not meet the first stage of the analysis in the *Milan Holdings Ltd.* decision. He has brought forward the same arguments he raised with the Delegate and the original Tribunal Member in the hope that the result will be different this time. He sought to provide new medical evidence for the reconsideration application which should have been available before the Determination was issued, and it was not shown that it would have led to a different result in any event. Finally, I have also taken into account the fact that Mr. Randhawa filed his application approximately three months late.
36. The application does not meet the threshold which would warrant a reconsideration and is therefore dismissed.

ORDER

37. Pursuant to section 116(1)(b) of the *Act*, the Original Decision dated November 9, 2009, is confirmed.

Carol-Ann Hart
Member
Employment Standards Tribunal