Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Unique Holdings Ltd, carrying on business as 48North Restaurant and Concept Lounge (Kelowna and Prince George)

("Unique Holdings")

- 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:** David B. Stevenson

**FILE No.:** 2015A/91

**DATE OF DECISION:** July 10, 2015

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Shounak Chakroborty | on behalf of Unique Holdings Ltd, carrying on business as 48North Restaurant and Concept Lounge (Kelowna and Prince George) |

## OVERVIEW

1. Unique Holdings Ltd, carrying on business as 48North Restaurant and Concept Lounge (Kelowna and Prince George) ("Unique Holdings") seeks reconsideration of a decision of the Tribunal, BC EST # D049/15 (the "original decision"), dated May 27, 2015.

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 17, 2015.

3. The Determination was made by the Director on a complaint filed by several employees (collectively, the "complainants") who alleged Unique Holdings had contravened the *Act* by failing to pay all wages owed to them.

4. The Determination found Unique Holdings had contravened several provisions of the *Act*, ordered the complainants be paid wages and interest in the amount of $4,443.77 and imposed administrative penalties on Unique Holdings in the amount of $4,000.00.

5. An appeal was filed by Unique Holdings on the ground that new evidence had become available that was not available when the Determination was being made.

6. The Tribunal Member making the original decision dismissed the appeal and confirmed the Determination, finding all of the "new evidence" that Unique Holdings sought to introduce was "reasonably capable of being provided during the complaint process" and, as such, did not satisfy even the first criterion of the test for allowing new evidence set out in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. The Tribunal Member noted that Unique Holdings was "provided numerous opportunities" to provide evidence in response to the allegations made by the complainants but had failed to provide all of the relevant information.

7. The Tribunal Member making the original decision addressed each piece of "new evidence" that Unique Holdings sought to include with the appeal and provided reasons for refusing to accept that "new evidence". I have reviewed the reasons provided in the original decision, comparing them with the Determination and the material in the section 112(5) record (the "record"). I find those reasons to be well grounded in the material on the file and the findings in the Determination, consistent with the law and policy of the *Act*, logical and reasonable.

## ISSUE

8. In any application for reconsideration there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should grant the request

to reconsider and either vary or cancel the original decision or refer the matter back to the original panel or another panel.

## ARGUMENT

9. In this application, Unique Holdings does no more than assert the refusal of the Tribunal Member making the original decision to accept the material provided as "new evidence" was "unfair" because the documents provided "came later", although that assertion is never fully explained. Otherwise, Unique Holdings simply continues to disagree with the Determination, both in terms of the wages found owing to the complainants and the administrative penalties imposed.

## ANALYSIS

10. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunal Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 states:

> *116 (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.*
>
> *(2) The director or a person served with an order or a decision of the tribunal may make an application under this section.*
>
> *(2.1) The application may not be made more than 30 days after the date of the order or decision.*
>
> *(2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion made more than 30 days after the date of the order or decision.*
>
> *(3) An application may be made only once with respect to the same order or decision.*
>
> *(4) The director and a person served with an order or decision of the tribunal are parties to a reconsideration of the order or decision.*

11. Except for the inclusion of statutory time limits for filing a reconsideration application or for the Tribunal reconsidering its own orders and decisions, the amendments are unlikely to significantly alter the Tribunal's approach to reconsiderations.

12. In that respect, the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the application and interpretation"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The approach is fully described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

> . . . the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute . . .

> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

13. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. Undue delay in filing for reconsideration will mitigate against the application. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

14. The Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

15. It will weigh against the application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

16. 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.

17. I am not persuaded this application warrants reconsideration. I am satisfied, based on the material that was before the Tribunal Member in the appeal and considering the scope of review under section 112 of the *Act*, there was no error made in the original decision.

18. This application does nothing more than re-submit the appeal, seeking to have this panel accept on reconsideration the "new evidence" that was rejected in the original decision, for no other reason than Unique Holdings' view that the original decision was "unfair" in not accepting the "new evidence" and cancelling the Determination. As indicated above, I find the original decision to have been well grounded in the relevant principles arising under section 112(1)(c) of the *Act* and on the facts found in the Determination and the "record".

19. Unique Holdings has not shown there was any error in the original decision that would cause the Tribunal to exercise its discretion in favour of reconsideration.

20. I note, although it is a matter on which I place no great weight, this application has been filed outside of the 30 day time limit that was part of the amendments to the *Act* which came into force on May 14, 2015.

21. Overall however, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly it is denied

## ORDER

22. Pursuant to section 116 of the *Act*, the original decision, BC EST # D049/15, is confirmed.

**David B. Stevenson**
**Member**
**Employment Standards Tribunal**