

An application for Reconsideration

- by -

Astrit Anton Kashari carrying on business as Monaco Hair Salon  
(“Monaco”)

- 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 L. Roberts

**FILE No.:** 2008A/54

**DATE OF DECISION:** July 24, 2008

## DECISION

### SUBMISSIONS

|                      |   |
|----------------------|---|
| Astrit Anton Kashari | on behalf of Monaco Hair Salon                    |
| Ian MacNeill         | on behalf of the Director of Employment Standards |
| Angelle Holmes       | on her own behalf                                 |

### OVERVIEW

1. This is an application by Astrit Anton Kashari carrying on business as Monaco Hair Salon (“Monaco”) for a reconsideration of Decision #D036/08 (the “Original Decision”), issued by the Tribunal on April 11, 2008.
2. Angelle Holmes worked as a hair stylist for Monaco. She filed a complaint alleging that Monaco contravened the *Act* in failing to pay her wages, including minimum wage for all hours worked, vacation pay, statutory holiday pay and compensation for length of service. Following an oral hearing on Ms. Holmes’ complaint at which Mr. Kashari and Ms. Holmes participated, the delegate concluded that Monaco had contravened sections 17, 18, 28, 46 and 83 of the *Act* and that Ms. Holmes was entitled to wages in the total amount of \$1,111.44. The delegate also imposed five administrative penalties of \$500 for each of the contraventions, under section 29(1)(c) of the *Act*.
3. Monaco appealed the decision on the grounds that the delegate had erred in law and failed to observe principles of natural justice. Essentially, Mr. Kashari’s appeal was that the Determination was unjust because it was based on Ms. Holmes’ “lies” and “fraudulent” actions. In his appeal, he outlined his evidence about what had occurred between the parties and set out his allegations about her untruthfulness.
4. In response to Monaco’s appeal, the delegate addressed each of the issues raised by Mr. Kashari and noted that some of the documents Mr. Kashari relied on had not been before him at the hearing. He contended that this documentation should not be considered on appeal.
5. The Tribunal member reviewed the submissions and concluded that the delegate had not erred in finding that Ms. Holmes was entitled to wages. She concluded that Mr. Kashari’s argument was, in essence, a dispute as to the facts upon which the delegate applied the law, and arguments about why the delegate should have preferred his evidence over that of Ms. Holmes.
6. The member set out the Tribunal’s definition of “error of law” and reviewed the points presented by Mr. Kashari. She concluded that Mr. Kashari had done nothing more than re-assert the facts he presented to the delegate, seeking to have the Tribunal reach a different conclusion on those facts. She noted

*The role of this Tribunal is not to re-weigh the evidence before the Delegate simply because Mr. Kashari takes the position that it is wrong, and accuses Ms. Holmes of being a liar. He must provide persuasive evidence that the conclusion reached by the Delegate is unsupported by the evidence which was before him.*

7. The member found no basis for Monaco's contention that the delegate erred in law.
8. The member also found no basis for Mr. Kashari's argument that the delegate failed to observe the principles of natural justice as the evidence demonstrated that he had full opportunity to present his case and explain his submissions.
9. Finally, the member addressed the new evidence submitted by Mr. Kashari on appeal and found that it could have been presented at the hearing. She concluded that Mr. Kashari failed to present any convincing argument that the result of the Determination would have been different had the delegate considered that evidence in any event.
10. The member dismissed the appeal.

## **ISSUE**

11. 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 or varied or sent back to the member?

## **ARGUMENT**

12. In his application for reconsideration, Mr. Kahari contends that his "problem" started with fraudulent documents ("time-working sheets") Ms. Holmes provided to the delegate. He alleges that "Employment Standards ignored the truth and decided to approve the lies and fraud time sheets" of Ms. Holmes.
13. In support of his application, Mr. Kahari repeats arguments made before the delegate and the Tribunal at first instance and makes additional comments about Ms. Holmes' work habits. He repeats his assertions the Ms. Holmes lied repeatedly and created false time sheets. He also submitted additional documentation, much of which was provided at the hearing and on appeal.
14. The delegate submits that Mr. Kahari has not identified any basis for the exercise of the reconsideration power. He says that the basis for Mr. Kahari's application, which is that Ms. Holmes' evidence was all lies and fraudulent evidence, is identical to the arguments made at the hearing and on appeal. He says that he heard, considered and analyzed all Mr. Kahari's arguments in the Determination, as did the member on appeal.
15. The delegate notes that one of the documents submitted by Mr. Kahari as being fraudulent was considered during the hearing. That document set out Ms. Holmes' hours of work during March and May. The delegate says that he adjusted Ms. Holmes' hours to reflect those recorded by Mr. Kahari. The delegate also notes that some of the documents submitted by Mr. Kahari in his reconsideration application consisted of altered documents. He submits that any analysis of the time records ought to be based solely on the originals which form part of the record.

16. The delegate notes that Mr. Kahari adds new information about Ms. Holmes that he did not provide at the hearing and submits that this new evidence cannot be considered during the reconsideration process.
17. Ms. Holmes submits that all the evidence submitted has already been considered and that Mr. Kahari simply wishes to re-argue his case yet again.

## THE FACTS AND ANALYSIS

18. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (“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.

### *The Threshold Test*

19. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
20. In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
21. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The member fails to comply with the principles of natural justice;
  - There is some mistake in stating the facts;
  - The Decision is not consistent with other Decisions based on similar facts;
  - Some significant and serious new evidence has become available that would have led the member to a different decision;
  - Some serious mistake was made in applying the law;
  - Some significant issue in the appeal was misunderstood or overlooked; and
  - The Decision contains a serious clerical error.

(*Zoltan Kiss* BC EST#D122/96)

22. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.
23. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.
24. In *Voloroso* (BC EST #RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:
- .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...
25. 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” is not 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.
26. I find no basis to exercise the reconsideration power in this case. Clearly, Mr. Kahari disagrees with the Determination. However, in my view, he has not raised any significant questions of law, fact, principle or procedure. His arguments focus on alleged lies and fraudulent documents provided by the employee. Those arguments were considered and found to have no merit by the Tribunal. I am not persuaded the Tribunal member erred in her consideration of those arguments.
27. I am also not persuaded that the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. There is nothing in Mr. Kahari’s submission that raises any question about the correctness of the Tribunal’s decision.
28. I decline to exercise the reconsideration power.

## **ORDER**

29. Pursuant to Section 116 of the Act, I deny the application for reconsideration and confirm the original decision.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**