

An Application for Reconsideration

- by -

Persepolis Restaurant & Lounge Corp.
("Persepolis")

- 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: Robert E. Groves

FILE No.: 2012A/59

DATE OF DECISION: August 22, 2012

DECISION

SUBMISSIONS

Mohsen Elahi Khansari on behalf of Persepolis Restaurant & Lounge Corp.
Megan Roberts on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application for reconsideration pursuant to section 116 of the *Employment Standards Act* (the “*Act*”). Mohsen Elahi Khansari (“Elahi”) applies on behalf of Persepolis Restaurant & Lounge Corp. (the “Employer”) for a reconsideration of a decision of a member of the Tribunal (the “Member”) dated May 7, 2012 (the “Original Decision”).
2. The Original Decision was issued because the Employer had appealed a decision of a delegate of the Director of Employment Standards (the “Director”) dated February 24, 2012, (the “Determination”). The Determination was the result of the Director’s investigation of a complaint under the *Act* filed by a former employee of the Employer, one Afshin Afarinesh (the “Complainant”), claiming that the Employer had failed to pay him wages, including overtime, statutory holiday pay, and vacation pay.
3. In the Determination, the Director found that the Employer owed the Complainant the sum of \$10,098.15 in respect of these items, together with interest. The Director also imposed six administrative penalties of \$500.00.
4. The total found to be owed by the Employer was, therefore, \$13,098.15.
5. On appeal, the Member decided that the Determination should be confirmed.
6. I have before me the Determination, the Reasons for the Determination, the Employer’s Appeal Form, the submissions of the Employer and the Director on the appeal, the record that was before the Director at the time the Determination was made, the Original Decision, the Employer’s application for reconsideration, its submissions on the application, and the submission of the Director.
7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 26 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I have concluded that this application shall be decided having regard to the written materials filed, without an oral or electronic hearing.

FACTS

8. The Complainant worked for the Employer as a cook from March 1, 2011, until August 15, 2011, when he quit his job. He then claimed that the Employer did not pay him wages for all the hours he had worked.
9. During the course of the investigation conducted by the Director the Complainant asserted that the wage statements issued to him by the Employer were inaccurate. The Complainant delivered to the Director a written summary of the hours he did, in fact, work, on a daily basis.

10. The Complainant also advised the Director that the Employer never paid him for his overtime hours, for statutory holiday pay, or for vacation pay.
11. On February 7, 2012, the Director sent to the Employer a Demand for Records pursuant to section 85 of the *Act*, together with a letter notifying the Employer that the Complainant had filed a complaint, setting out the substance of the Complainant's allegations, advising the Employer that the Director was conducting an investigation, and inviting the Employer to deliver a response. The date stipulated for the receipt of the Employer's response, and the records sought in the Demand, was February 21, 2012.
12. The Demand, and the letter, were sent to the Employer's former operating address, its registered and records office, and to the mailing address of its principal, Mr. Elahi, by registered mail. The Canada Post information the Director received thereafter was to the effect that delivery cards were left at the Employer's registered and records office and at Mr. Elahi's address, but that the mailing was not picked up. However, the mailing was received at the former operating address of the Employer.
13. I say "former" operating address because the Director attempted to contact the Employer and Mr. Elahi at the Employer's telephone number and was advised by an individual ("Mr. P.") who answered that the Employer had sold the restaurant in November 2011. Mr. P. provided the Director with contact information for Mr. Elahi and the lawyer who had acted for the Employer on the sale ("Mr. N.").
14. In a subsequent call to Mr. N., the Director was advised that the sale had occurred, but that Mr. N. no longer represented either the Employer or Mr. Elahi.
15. The Director attempted to telephone Mr. Elahi's cell phone number provided by the Complainant and Mr. P. At first, the calls went unanswered. Later, the phone number was "no longer in service."
16. No response to the investigation was ever received from the Employer by the Director prior to the issuance of the Determination. This meant that the allegations of the Complaint went unchallenged. The Director considered the Complainant's submissions and examined the records he had produced. The Director found them credible, and calculated the amount of the Complainant's wage claim having regard to them.
17. When the Determination was issued, the Director sent it to the same addresses to which the earlier Demand and letter had been sent on February 7, 2012. Mr. Elahi must have received the Determination because he filed an appeal under the *Act*, within the time prescribed.
18. In the appeal, the Employer sought an order cancelling the Determination and referring the Complainant's wage claim back to the Director for further investigation. The substantive basis for the appeal was that the Director failed to observe the principles of natural justice in making the Determination. In support of this contention, Mr. Elahi, on behalf of the Employer, said this:

During the time, which the investigation was taking place, I was not in the country because of a family emergency. The preliminary information was submitted to the company under which the claim was made, however, I no longer have had any affiliation with Persepolis Restaurant & Lounge as I sold the restaurant in October. Any mail or contact to the restaurant is up to the current management to forward to me at their discretion. The other address, which the information was sent to, is also a previous address of mine to which I have no affiliation. The address was old, and was established in 2009.

Therefore, the Determination was unjustly made without any consideration to my response and solely based upon evidence and allegations submitted by the opposing party ultimately making the ruling a one-sided judgment. The Determination is the only documentation I have actually received and been able to review.

19. The Member did not consider the appeal to be well founded. He was sceptical of Mr. Elahi's statement that he was out of the country at the relevant time, principally because Mr. Elahi had provided no documentary or other telling evidence to prove his point, apart from his bare assertion. But even if the assertion was true, the Member pointed out that the Director was entitled to rely on the deemed service provisions set out in the *Act*.
20. Moreover, the Member could find no evidence to support a finding that the Director had failed to observe the principles of natural justice, and in particular, to make reasonable efforts to give the Employer an opportunity to respond to the substance of the complaint, as required by section 77 of the *Act*. To the contrary, the Member was of the view that the Director had made every reasonable effort to apprise the Employer of the investigation, and that there was really nothing more that could have been asked of the Director in that regard, in the circumstances.
21. In the result, the Original Decision confirmed the Determination.
22. In its application for reconsideration, the Employer seeks to lead evidence refuting the Director's findings in the Determination relating to the Complainant's hours of work. It also challenges the Director's conclusion that the Employer did not pay the Complainant all the sums owed to him under the *Act*. The lone exception is vacation pay, which the Employer concedes it did not pay.
23. Attached to the application is what appears to be a copy of a boarding pass for IranAir in the name of Mr. Elahi in respect of a flight on KLM Royal Dutch Airlines from Amsterdam to Vancouver on February 13. The pass does not appear to disclose a year of issue, but for the purposes of this application I will assume that it was issued in 2012.

ISSUES

24. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

ANALYSIS

25. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:
- 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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.
26. The reconsideration power is discretionary, and must be exercised with restraint. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision

with which it is unhappy. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. Having regard to these principles the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.

27. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant a reconsideration of the Tribunal's original decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness.
28. In my opinion, the Employer has failed to demonstrate that the Member's conclusion in the Original Decision warrants reconsideration.
29. The Employer's principal ground supporting its attack on the Determination in the appeal proceeding was that the Director failed to observe the principles of natural justice. However, there is nothing in the material the Employer has submitted, either on appeal, or on this application, which even remotely suggests that the Director fell short in meeting its obligations to the Employer. It follows that I am in no way persuaded that the Member erred when he confirmed the Determination, having regard to this ground.
30. It must be remembered that section 77 only requires the Director to make *reasonable* efforts to give a person under investigation an opportunity to respond. The duty is not absolute. It is not the law that the Director will have failed to observe the principles of natural justice simply because the person under investigation did not have an opportunity to respond.
31. In the circumstances of this case, I completely agree with the Member's conclusion that the Director appears to have taken all the steps that one could reasonably expect so that the Employer would be apprised of the substance of the complaint, the Director's investigation of it, and the Director's request for a response from the Employer, prior to the issuance of the Determination.
32. In my view, the Member was entirely correct to say that the Director could rely on the deemed service provisions in the *Act*. It is section 122 which is engaged. The relevant parts of that section say this:
- 122 (1) A determination or demand...that is required to be served on a person under this Act is deemed to have been served if
- ...
- (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination or demand...is deemed to be served 8 days after the determination or demand...is deposited in a Canada Post Office.
33. Not only did the Director forward the Demand and letter to the Employer's last known operating business address, the Director also forwarded the material to the address for the Employer's principal, Mr. Elahi, noted on a corporate search for the Employer obtained by the Director, and the registered and records office for the company. When the Director learned that the Employer had sold its restaurant business, the Director followed up with telephone calls to the Employer's legal counsel, and to the telephone number provided by these sources for Mr. Elahi. I agree with the view expressed by the Member that little else could have been done in order for the Director to meet its natural justice obligations.

34. The Employer argues that the Determination is unjust because Mr. Elahi was out of the country while the investigation was ongoing, and so the Employer had no opportunity to respond to the complaint. In the circumstances of this case, however, I believe Mr. Elahi's absence is beside the point. His absence may have been the reason why the Employer did not respond to the complaint, but the Employer's failure to respond for that reason in no way leads to the conclusion that the Director failed to observe the principles of natural justice. There is no suggestion in the materials I have before me that the Director was ever aware, prior to the issuance of the Determination, that Mr. Elahi was out of the country.
35. Further, as I have noted, the boarding pass which Mr. Elahi has delivered, for the first time, on this application for reconsideration, is dated February 13. Even if assume, as I have, that it is February 13 in 2012 which is referred to on the pass, it still suggests that Mr. Elahi was in Vancouver some eight days before the February 21, 2012, response date stipulated in the Director's Demand for Records, and the letter which accompanied it. Furthermore, Mr. Elahi has produced no evidence shedding light on when he left the jurisdiction, before returning on February 13, 2012.
36. The Director's statement in the Reasons for the Determination that delivery notification cards for these materials were left at the Employer's registered and records office address, and Mr. Elahi's address listed on the corporate search, is uncontradicted. Also uncontradicted is the Director's statement that the materials were successfully delivered to the Employer's operating business address. Finally, it is uncontradicted that the Determination was forwarded to these same addresses, and Mr. Elahi must have received it, because he later filed an appeal of it to the Tribunal, on behalf of the Employer. Indeed, in a submission on this application, Mr. Elahi states that he received the Determination from the "current manager" of the restaurant business.
37. It is a mystery, therefore, why the investigation, and the Demand materials, did not come to the attention of the Employer, and in particular Mr. Elahi, prior to the issuance of the Determination. Whatever the reason, the fact that they did not cannot be laid at the feet of the Director.
38. On this application for reconsideration, the Employer also seeks to introduce new evidence from other employees of the Employer who worked with the Complainant, relating to the hours the restaurant was open, and whether the Complainant received all his wages. The evidence also contains opinions to the effect that the Complainant was a poor employee. In addition, the Employer has attached wage statements for the Complainant.
39. There are several reasons why I have decided that this evidence is insufficient to warrant a reconsideration of the Original Decision.
40. The quality of the Complainant's performance on the job, and the accuracy of his wage claim, were raised as issues by the Employer in the appeal proceedings leading up to the Original Decision. On the latter issue, it was one of the Employer's principal contentions that the Complainant's tabulation of wages owed to him was fabricated, at least in part, and included claims for hours worked when the restaurant was not open. The Director countered this assertion with evidence from online searches of advertising and business review sites for the Employer which showed that the restaurant was open for periods of time greater than that suggested by the Employer in its submissions on appeal.
41. The Member referred to the Employer's submissions on these points in the Original Decision, but limited his decision to the natural justice issue identified as the basis for the appeal on the Employer's Appeal Form. It is to be inferred from the Member's decision, however, that he declined to accept the Employer's assertions regarding the Complainant's job performance, and the veracity of his wage claim.

42. On this application for reconsideration, the Employer has again raised the issues of the Complainant's job performance, and the accuracy of his wage claim. It has often been said in the decisions of the Tribunal that an appeal under section 112 of the *Act* should not simply be an opportunity for a losing party to attempt to have the Tribunal re-weigh evidence, to bolster with new evidence a view of the facts as found in the proceedings involving the Director, or to introduce entirely new evidence that should have been tendered at an earlier stage. Those prescriptions apply with even greater restrictive force on an application for reconsideration.
43. Moreover, the probative value of the evidence the Employer has presented is extremely low. Primarily, the evidence consists of brief, bald, unsworn statements to the effect that the Complainant received all wages owed to him, and that the restaurant was only open for dinner service. In a reply submission, the Director again points to another online source which indicates that the Employer's restaurant was open for lunch. In a further reply submission, Mr. Elahi concedes that he did offer lunch service, but it was "never a full time, official thing."
44. The Employer also includes wage statements for the Complainant in its application for reconsideration. I assume they are included by the Employer to suggest that the Complainant was paid for his work in full. Some of these documents appear to have been considered by the Director during the investigation. The Director accepted the Complainant's assertion that they did not accurately represent what the Complainant was owed in respect of wages for the work he performed.
45. In the result, I am not persuaded that the Employer has presented any new factual information which could justify my interfering with the decision of the Member in the Original Decision.

ORDER

46. Pursuant to section 116 of the *Act*, I order that the Original Decision of the Member dated May 7, 2012, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal