

An Application for Reconsideration

- by -

All India Restaurants & Sweets (2001) Ltd.
(“All India”)

- 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.: 2012A/80

DATE OF DECISION: September 6, 2012

DECISION

SUBMISSIONS

Gurbakhsh Singh Khatkar	on behalf of All India Restaurants & Sweets (2001) Ltd.
Subash Mankatala	on his own behalf
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. All India Restaurants & Sweets (2001) Ltd. (“All India”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D058/12, made by the Tribunal on June 13, 2012 (the “original decision”).
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 24, 2012.
3. The Determination was made by the Director on a complaint filed by Subash Mankatala (“Mankatala”), who alleged All India had contravened the *Act* by failing to pay regular and overtime wages, annual vacation pay and statutory holiday pay. The Determination found that All India had contravened Part 3, section 17, Part 4, section 40, Part 5, section 45 and Part 7, section 58 of the *Act* of the and ordered All India to pay the complainant \$11,391.04, an amount which included both wages and interest.
4. The Director also imposed administrative penalties on All India under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
5. The appeal filed by All India sought to have the Determination cancelled.
6. The Tribunal Member of the original decision dismissed the appeal and confirmed the Determination.
7. In this application, All India submits the Tribunal should review the original decision and dismiss the complaint.

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 the original decision and dismiss the complaint.

ARGUMENT

9. The reasons provided by All India in support of the reconsideration request are brief, comprising four paragraphs. I will set them out in their entirety:
 - “1) We request the tribunal to reconsider the case and reject his false claim.

- 2) The complainant submitted a computer generate time sheet indicating working ten hour per day during Aug 2009 to Feb 2010 How can any person believe that an employee can work exact ten hour per day in food business which is unacceptable but surprising accepted by the delegate of employment standard branch, without corroborated by any witness or other evidence.
 - 3) We further request the that tribunal should direct the complainant to provide third party evidence to support his claim.
 - 4) We are in a position to provide the evidence that the complainant abusing the system as he never worked overtime during the period of his employment. Previously we have no other witness to support our case Now we have concreter evidence that one other employee who have worked with the complainant and that employee will support that complainant worked only 40 hour a week and 8 hour per day and any employee never worked overtime in the restaurant.”
10. The Director’s response to this request is that All India simply disagrees with the findings made in both the Determination and the original decision, but has provided little basis for reconsideration beyond their expression of disagreement. The Director says the request does not meet the threshold for reconsideration as described in *Milan Holdings Ltd.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97).
11. Mankatala has also filed a response to the reconsideration request. His response deals more with the substance of the assertions made by All India about his hours of work than with whether the Tribunal should grant the request to reconsider the original decision.
12. In their final reply, All India addresses the substance of Mankatala’s response, reasserting their position on the merits of his claim of having worked 10 hours a day, submitting there is a discrepancy in his response and his initial claim regarding the hours he worked and saying the Tribunal should seek an explanation from him concerning the exact hours he worked. All India also reasserts their claim that no employees work more than eight hours a day and 40 hours in a week of five days.

THE FACTS AND ANALYSIS

13. 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 named in a decision or order of the tribunal may make an application under this section*
- (3) *An application may be made only once with respect to the same order or decision.*
14. As 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 interpretation and application” 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 Ltd.*, 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 Giovanni (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” 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.

15. 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. 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.
16. 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.
17. It will weigh against an 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.
18. 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.

ANALYSIS

19. Having reviewed the original decision, the material in the appeal file and the submissions of the parties on the reconsideration request, I am not persuaded this matter warrants reconsideration.
20. As noted above, the focus of a reconsideration request is the correctness of the original decision.
21. All India has, however, requested the Tribunal to revisit findings made in the Determination in the context of more “new evidence” and an alleged error by the Director in reaching the findings concerning the hours worked by Mankatala.
22. There is no reference at all to there being any error in the original decision, and I can find none.
23. In the appeal, All India sought to have the Determination reviewed on each of the grounds listed in section 112(1). Such a review was performed in the original decision. The Tribunal Member of the original decision

found there was no “evidence” submitted with the appeal that could be considered “new” and no failure by the Director to observe principles of natural justice. In respect of the latter finding, the original decision noted the material in the file revealed All India was made aware of the substance of Mankatala’s complaint, given ample opportunity to respond and that their response, although rejected, was carefully considered by the Director.

24. In respect of the alleged error of law, the Tribunal Member of the original decision found the appeal did not raise an error of law, but sought to challenge findings of fact made by the Director, and that section 112 did not permit the Tribunal to consider appeals based on alleged errors of fact unless such errors of fact were shown to raise an error of law. That is a correct reading and application of the appeal authority of the Tribunal under section 112(1) (a). The original decision concluded that no error of law in the findings of fact made by the Director was shown. I find no error in the original decision with that conclusion.
25. This reconsideration request is quite accurately characterized as nothing more than an invitation for the Tribunal to re-visit the appeal and the original decision and come to a different conclusion. That is inconsistent with the statutory purpose and objective of section 116 and is an inappropriate application of the reconsideration authority of the Tribunal.
26. I will add that the suggestion by All India that there is “new evidence” that Mankatala did not work more than eight hours in a day or forty hours in a week, is, to paraphrase the original decision, not evidence that can be described as “new”. The investigation of Mankatala’s complaint by the Director spanned a period from November 2010 to October 2011, with the Determination being issued in February 2012. Mankatala’s claim for overtime, and the basis for it, was on the table from the outset. In that period there is no indication from All India that there were “witnesses” with whom the Director could speak concerning the overtime work aspect of his claim. Nor is there any suggestion in the appeal that such evidence could be made available to the Tribunal or any effort to explain why it was not provided to the Director. All India had ample time and opportunity to provide to the Director during the complaint investigation process the evidence it now says is available to the Tribunal in this proceeding. It was All India’s responsibility to ensure the Director was provided with all of the evidence supporting its position. It is unacceptable for them to continue to attempt to add information at this stage that should have, if there was any validity to it, been given to the Director at the outset.
27. As well as concerns about whether such evidence could be accepted as credible and probative, it is well past the time for making such an assertion and is in any event unsupported by anything except the bald assertion made in the submission and the names and contact numbers of two individuals. This alleged “new evidence” cannot, and will not, be considered in this application.
28. In sum, All India has not shown the original decision was wrong in any respect. The Tribunal will not revisit the arguments made by All India in its appeal. The application for reconsideration is denied.

ORDER

29. Pursuant to section 116 of the *Act*, the original decision is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal