

An Application for Reconsideration

- by -

Glacier Park Lodge Ltd.
("GPL")

- 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: Shafik Bhalloo

FILE No.: 2009A/095

DATE OF DECISION: September 10, 2009

DECISION

OVERVIEW

1. In and during the winter and spring 2007-2008, Aurora C. Chavez (“Ms. Chavez”), Maricar B. Medrano (“Ms. Medrano”), Concepcion R. Mondragon (“Ms. Mondragon”) and Cristeta S. Vicmudo (“Ms. Vicmudo”) (collectively “the complainants”) were temporary foreign workers from Philippines employed as housekeepers and restaurant workers by Glacier Park Lodge Ltd. (“GPL”) at GPL’s hotel, the Best Western Glacier Park Lodge, at the summit of Rogers Pass in British Columbia.
2. Between June 19 to 23, 2008, the complainants filed their separate but substantively similar complaints with the Employment Standards Branch (the “Branch”) alleging that GPL contravened the *Employment Standards Act* (the “*Act*”) by failing to pay them regular and overtime wages, statutory holiday pay, and length of service compensation and requiring each of them to pay airfare from the Philippines to Canada.
3. A delegate of the Director of Employment Standards (the “delegate”) investigated the complaints and received submissions and evidence from both the complainants and GPL. The delegate subsequently issued his Determination on February 18, 2009 finding GPL to have contravened Part 3, sections 18 and 21 of the *Act* and ordered GPL to pay the complainants a total of \$12,339.25, an amount which included wages and interest payable under section 88 of the *Act*.
4. Further, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”), the delegate imposed on GPL two administrative penalties of \$500.00 each. The administrative penalties were in respect of GPL’s contravention of section 18 of the *Act* which requires employers to pay all wages owing to an employee within six days after the employee quits and section 46 of the *Regulation* for GPL’s failure to produce a record of the hours worked by each employee on each day.
5. GPL appealed the Determination to the Tribunal. The grounds of appeal identified on the Appeal Form of GPL are two, namely, error of law and new evidence available, which was not available at the time the Determination was being made. However, in its appeal submissions, GPL identified several errors of fact, errors of law and errors of mixed fact and law and submitted some new or previously undisclosed evidence.
6. In the Original Decision (BC EST # D059/09) made on June 10, 2009, the Member considered the submissions of GPL on each of the two grounds of appeal identified in the Appeal Form—error of law and new evidence— and permissible under section 112(1)(a) and (c) of the *Act* but found no support to cancel or vary the Determination on these grounds. With respect to GPL’s submissions alleging errors of fact, the Member noted that errors of fact do not constitute a permissible ground of appeal under section 112 of the *Act* unless such errors amount to an error of law which was not the case in GPL’s appeal. As a result, the Member dismissed GPL’s appeal with one variation in the Determination based on the submissions of the Director, GPL and Ms. Vicmudo. In particular, the Member noted that the Director, in his submissions, pointed out that his initial conclusion regarding wages owing to Ms. Vicmudo was incorrect in that she had not been paid any wages for her period of employment with GPL and was owed additional wages in the amount of \$1,569.00. Both GPL and Ms. Vicmudo, in their appeal submissions, agreed with the Director’s submission. Therefore, the Member ordered the Determination to be varied to include the additional amount of \$1,569.00 owed to Ms. Vicmudo for a total award against GPL of \$14,908.25, together with any accrued interest under section 88 of the *Act*.

7. GPL now requests, on a very limited basis, a reconsideration of the Original Decision under section 116 of the *Act*. There are two grounds or basis for GPL's reconsideration application. First, GPL alleges that the Director and the Member failed to consider that the employment contracts between GPL and the employees required the latter to pay GPL \$390.00 per month for room and board and both the Determination and the Original Decision failed to consider and deduct the room and board charges for the month of May 2008 from the amounts awarded to Ms. Mondragon, Ms. Medrano and Ms. Chavez. In the case of Ms. Mondragon and Ms. Chavez, GPL submits that a deduction of \$338.00 should be made for room and board from the amounts awarded to each of them and in the case of Ms. Medrano, the amount GPL seeks deduction of is \$182.00.
8. The second ground for reconsideration raised by GPL is that the Member erred in law in failing to consider "the question of whether the amount claimed by the employees [for reimbursement for airfare from Philippines to Canada] was fair, reasonable or credible".
9. Pursuant to section 36 of the *Administrative Tribunal's Act* (the "*ATA*"), which is incorporated into the *Act* (s. 103) and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the reconsideration application is not necessary and therefore I propose to adjudicate GPL's reconsideration application based on the written submissions of the parties and a review of both the Determination and the Original Decision. As this reconsideration application is limited to the two matters referred to above, I find it neither necessary nor relevant to review the history of those matters not under contention in the reconsideration application but which the Member painstakingly reviewed in the Original Decision.

ISSUE

10. In an application for reconsideration, there is a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision. If the Tribunal, in its consideration of the threshold issue, is satisfied that the case is appropriate for reconsideration, then the Tribunal will proceed to the next stage, which involves consideration of the substantive issues or the merits of the application. In this case, the substantive question for the Tribunal, at the second stage, is whether the Original Decision reveals any errors of law with respect to the two matters raised in the reconsideration application, namely: (i) the alleged failure of the Director and the Member to consider and deduct from the awards made in the Determination (as varied in the Original Decision) to Ms. Mondragon, Ms. Medrano and Ms. Chavez for the unpaid amounts for room and board for the month of May 2008; and (ii) the alleged failure of the Member to consider "the question of whether the amount claimed by the employees [for reimbursement for airfare from the Philippines to Canada] was fair, reasonable or credible".

GPL'S SUBMISSIONS

11. GPL's submissions in its reconsideration application, as previously indicated, deal with two matters, namely, the alleged failure of the Director and the Member to deduct from the wages awarded to the employees for the unpaid room and board charges and the alleged failure of the Member to consider the question of whether the amounts claimed by the employees for airfare was "fair, reasonable or credible". Both these submissions are delineated under separate descriptive headings in GPL's submissions and I propose to delineate them here similarly under separate headings.

(i) Failure to Deduct Room and Board Charges

12. GPL argues that both the Director and the Member, in making their findings and reaching their conclusions, have relied on the employment contracts between GPL and the employees but failed to consider that the contract provides each employee would pay \$390.00 per month for room and board provided by the employer. In particular, in paragraph 14 of each contract of employment it states:

14. THE EMPLOYER agrees to ensure that reasonable and proper accommodation is available for the EMPLOYEE, and shall provide the EMPLOYEE with suitable accommodation, if necessary. If accommodation is provided, the employer shall recoup costs as outlined below. Such costs shall not be more than is reasonable for accommodations of that type in the employment location.

THE EMPLOYER will / will not provide the EMPLOYEE with accommodation. (Mark X beside appropriate box)

If yes, THE EMPLOYER will recoup costs at an amount of \$390 per Month (month, 2 week period etc.) through payroll deductions.

13. According to GPL, its president, Aaron Fu (“Mr. Fu”) raised the matter of the deduction of the room and board charges from the employees’ wages “in his statement to the Branch”. However, GPL has not provided any written statement from Mr. Fu to the Branch or the delegate and there is no evidence in the section 112(5) record provided to me to support GPL’s contention that Mr. Fu raised this issue at any time with the Branch or the delegate.
14. According to GPL, Ms. Mondragon and Ms. Chavez each owe GPL \$338.00 for room and board charges for the month of May 2008 and Ms. Medrano owes GPL \$182.00 for the same period. According to GPL, these unpaid amounts should be deducted from the wages awarded to each of the employees.

(ii) Airfare Charges

15. GPL argues that while the Member, pursuant to section 21 of the *Act*, confirmed the Determination on the issue of the airfare charges incurred by each of Ms. Mondragon, Ms. Medrano and Ms. Chavez, the Member failed to question “whether the amount claimed by the employees was fair, reasonable and or credible”. According to GPL, it is not “reasonable for the employer to bear, as a business expense, any amount whatsoever which an employee wishes to incur for airfare”. GPL submits that in the Determination, the delegate found the airfare paid by Ms. Medrano was \$519.13 and in the case of Ms. Mondragon, \$613.30. Therefore, argues GPL, the claims for airfares of \$1,780.29 and \$1,633.75 by Ms. Chavez and Ms. Vicmudo are unreasonable and incredible. GPL adds “[a]s a matter of law the Tribunal was required to ask whether such claims were reasonable or credible, or whether to accede to them would bring the administration of the act into disrepute”.
16. GPL also takes issue with the purchase of the airline tickets in U.S. dollars by Ms. Chavez and Ms. Vicmudo and not the currency of the Philippines and the failure of the Member to comment on this matter.
17. GPL also submits that the Member’s decision to confirm the Determination with respect to the airfare awards to Ms. Chavez and Ms. Vicmudo which amounted to three times the value of the airfare awarded to Ms. Medrano would bring the administration of justice into disrepute, particularly when these employees “resigned without notice after working only a short period of time for the employer”. GPL particularly singles out Ms. Vicmudo in its submissions by pointing out that she “arrived without announcement long after the need for any of her services had past”. GPL states that she “was not wanted or required by the

employer, and ... was only kept on because the other three employees said that they would give up some of their hours if the employer would permit her to stay". GPL questions the justification for the decision to award Ms. Vicmudo her airfare when she "quit within one month, without notice".

18. I also note that GPL made a final submission dated August 21, 2009 after the submissions of all the complainants. I do not find those submissions very helpful except to point out that they reiterate for the most part the submissions made by GPL earlier.

SUBMISSIONS OF MS. VICMUDO

19. In response to GPL's submissions questioning the airfare Ms. Vicmudo paid for her flight from Philippines to Canada, Ms. Vicmudo states:

In Philippines as well as in other places different travel agencies have different ways of earning businesses so therefore they offer different prizes [sic] for air tickets and it depends also in [sic] the season.

I have provided a faxed copy of my original receipt as well as my e-ticket Itenerary [sic], so it is clear and it is not questionable.

20. With respect to the US currency she used to purchase her airline ticket, Ms. Vicmudo states:

About the currency it is not supposed to be an issue because it is a Travel Agency therefore its [sic] a business dealing internationally so that's the reason they only accept payment in US dollor [sic].

21. Ms. Vicmudo also disputes that she left without any notice to GPL on the basis that she, together with the other employees, provided Mr. Fu with a letter of resignation, which was produced to the delegate during the latter's investigation of the complaints. The balance of Ms. Vicmudo's submissions are not relevant to the issues raised in GPL's reconsideration application and I do not find them necessary to delineate here.

SUBMISSIONS OF MS. MONDRAGON

22. Ms. Mondragon's submissions in reply to GPL's application comprise of a very short single page letter, which I choose to set out verbatim below:

July 30, 2009

MARCELLA GORDON
Tribunal Administrator/Manager Appeals
Employment Standards Tribunal

Dear Madam:

A letter reply for the reconsideration from Bruce F. Fairley on behalf of the Glacier Park Lodge.

The Glacier Park Lodge can deduct the amount which states that I owe for the later part of my stay for the board and lodging. We are all aware that I did not receive any salary for the month of May 2008.

In this regard, I am waiting for the final decision and action. I need my money for my children.

Thank you and more power.

Respectfully yours,

Conception R. Mondragon

SUBMISSIONS OF MS. CHAVEZ

23. Ms. Chavez, like her colleague Ms. Mondragon, submitted a very short letter in response to GPL's reconsideration application, which I have decided also to delineate verbatim below:

August 18, 2009

The Employment Standards Tribunal

To whom it may concern,

I would like to response the Letter of reconsideration from Mr. Fu. He can deduct room and board from the amount he owe from me and about the air fare ticket i dont have any idea why the ticket of Cristeta and I is much higher than than Conception and Maricar, i was only paying how much they travel agency collected from me and i was from Cebu Philippines and not from Manila.

Here is my Air ticket (copy)

Thank you for your consideration.

Very Respectfully Yours,

Aurora C. Chavez

SUBMISSIONS OF MS. MEDRANO

24. In her submissions in reply to GPL's reconsideration application, on the subject of the airfare charges, Ms. Medrano submits that she and her colleagues bought tickets from different agents and came from different places. In the case of Ms. Chavez, Ms. Medrano says that she came all the way from Cebu, which is a greater distance to travel from the airport than others. In the case of Ms. Mondragon, she came from Taiwan and Ms. Vicmudo came from the same place as Ms. Medrano, Manila.
25. Ms. Medrano also points out that the date of the flight and the year that each complainant bought their tickets to Canada is also "not the same". In summary, she submits, "not all fare [sic] are the same price at all time [sic]".
26. With respect to the cost of room and board, she notes that "it is the fixed price from the lodge to collect that amount to all there employees who are working to them [sic] & beside they are the one who are already taking all of this payment out of our salary from our cheque itself [sic]."
27. Finally, she submits that she is entitled to one week's pay for severance, as it is GPL who fired her. She denies that she "left without permission" and submits that it was Mr. Fu who fired her "in front of all the staff".

DIRECTOR'S SUBMISSIONS

28. The Director has made no submissions in response to GPL's Reconsideration application.

ANALYSIS OF THE PRELIMINARY ISSUE

29. Section 116 of the *Act* confers the Tribunal with the authority to reconsider and confirm, cancel or vary its own orders or decisions:

Reconsideration of orders and decisions

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.

30. The Tribunal has repeatedly indicated in past reconsideration decisions that its authority under Section 116 of the *Act* is discretionary in nature as the Tribunal “may” reconsider its own orders or decisions. In *Re Eckman Land Surveying Ltd.* BC EST # D413/02 the Tribunal further instructed that its discretion in this regard is to be exercised with caution:

31. Further instructive of the reconsideration process is the oft quoted decision of the Tribunal in *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST # D313/98. In this case the Tribunal delineated a two-stage process that it employs in determining whether or not to exercise its reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (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; (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; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

32. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.

33. In this case, the submissions of GPL relate to two matters - room and board deductions and airfare charges - which I will consider separately under descriptive headings below.

(i) Room and board charges

34. While GPL submits that its president, Mr. Fu, raised the issue of the deduction of room and board charges in his statement to the Branch, I do not find any evidence of this in any written correspondence from GPL to the Branch or in any other documentation produced in the section 112(5) record in this reconsideration application. Further, I note that if Mr. Fu raised the matter of the deduction of the room and board charges with the delegate during the investigation of the complaints, GPL did not raise the matter in its appeal of the Determination. It appears to me that the issue of the room and board charges is raised for the first time by GPL in its reconsideration application.
35. In the normal course, my view is that it is not appropriate, in an application for reconsideration, to address issues that were not argued before the Member. However, I do not find this case to be the norm as concerns reconsideration applications. I say this simply because Ms. Chavez and Ms. Mondragon do not dispute the charges for room and board GPL claims and both agree in their submissions that GPL may deduct the amount for room and board they owe from the wages awarded to them in the Determination. In the case of Ms. Medrano, while she does not come outright and say that GPL should deduct the room and board charges they claim she incurred which remain unpaid, she does not dispute the charges GPL claims and acknowledges that there is “fixed price” that she and other employees are charged for room and board and that GPL in the normal course deducts it from their salaries.
36. Having said this, and further having reviewed the provision in the employment contracts of each of Ms. Chavez, Ms. Medrano, and Ms. Mondragon and taking into consideration the submissions of each of these complainants on the subject and taking into consideration the stated purpose of the *Act* in section 2(b) - to promote the fair treatment of employees and employers - I find it is fair for GPL to be credited from the wages awarded to each of Ms. Mondragon, Ms. Medrano and Ms. Chavez the amounts they each owe for room and board for May 2008.

(ii) Airfare charges

37. I have carefully reviewed GPL's submissions on the airfare issue delineated in the reasons for the Determination and subsequently in the appeal of the Determination and also in the reconsideration application. It is clear to me the GPL's primary focus is to have the reconsideration effectively reweigh the evidence on this issue already tendered to the delegate in the investigation of the complaints and subsequently tendered to the Member in the appeal of the Determination with a view to obtaining a favourable decision on this occasion. This Tribunal has indicated time and again that reconsideration is not an opportunity to rehear the evidence and re-determine the matter afresh. In the circumstances, GPL's reconsideration application on this ground fails.
38. Having found that GPL does not meet the threshold test for reconsideration on the airfare issue, I am not required to proceed to the second stage and review GPL's application on the merits on this issue. However, if I am wrong in this decision, I have reviewed the merits of the submissions of GPL on this issue and I find the reasoning and conclusion of the Member set out in the paragraphs below in the Original Decision both persuasive and compelling and I would be inclined to decide accordingly.

49. GPL's reply submission relating to the airfare continues their conceptual error that in requiring GPL to reimburse the complainants for airfare, the Director is only enforcing the employment contract. To reiterate, the decision to require repayment of the airfare does not arise from the contract, but arises from section 21 of the *Act*, which prohibits an employer from requiring an employee to pay the employer's business costs. There is nothing in the Determination to suggest the Director is enforcing the travel

expenses term in the contract. I would have thought that was clear enough at page 6 of the Determination, where the Director states:

Therefore I find that GPL has contravened section 21 of the Act and must pay the cost of one-way air fare from the complainant's [sic] country to the place of work.

50. GPL says that requiring them to pay the cost of airfare is unfair and unreasonable. I disagree. Requiring GPL to comply with the *Act* is neither unfair nor unreasonable.

ORDER

39. Pursuant to section 116 of the *Act*, I am varying the Original Decision to allow the deductions of the room and board charges sought by Glacier Park Lodge Ltd. for the month of May 2008 in the amounts indicated from the individual awards made to Ms. Mondragon, Ms. Medrano and Ms. Chavez in the Determination dated February 18, 2009 as varied by the Original Decision dated June 10, 2009. In all other respects I confirm the Original Decision.
40. In the interest of attaining greater clarity for the parties concerned with respect to the precise amounts due to each employee from Glacier Park Lodge Ltd., I refer the matter back to the Director with specific instructions to calculate, after making the appropriate deductions for room and board charges, any interest adjustments in the individual awards of the concerned employees.

Shafik Bhalloo
Member
Employment Standards Tribunal