



Employment
Standards
TRIBUNAL

BC EST # RD099/06
Reconsideration of BC EST # D148/05 & # D149/05

An application for Reconsideration

- by -

Jenny Jang operating as New Moon Restaurant
(“Ms. Jang”)

- 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 Nos.: 2006A/82 & 2006A/83

DATE OF DECISION: September 27, 2006

DECISION

SUBMISSIONS

Samuel J. McLean

on behalf of Jenny Jang

Michelle Allman

on behalf of the Director of Employment Standards

OVERVIEW

1. Jenny Jang operating as New Moon Restaurant ("Ms. Jang") seeks reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of two decisions, BC EST #D148/05 and #D149/05, made by the Tribunal on September 26, 2005 (the "original decisions"). The original decisions considered appeals of a Determination issued by a delegate of the Director of Employment Standards on June 13, 2005. The Determination had found Ms. Jang had contravened Sections 16, 18, 27, 40 and 58 of the *Act* in respect of the employment of Chuck Lap Ng ("Mr. Ng") and Sections 16, 27, 40 and 58 in respect of the employment of Jordan Stewart ("Mr. Stewart") and ordered Ms. Jang to pay wages to Mr. Ng and Mr. Stewart in the amount of \$7,195.16.
2. The Determination also imposed administrative penalties on Ms. Jang in the amount of \$3000.00
3. Ms. Jang appealed the Determination on the ground that additional evidence had come available that was not available at the time the Determination was being made. The appeals were decided without an oral hearing.
4. The Tribunal dismissed the appeals.
5. This application for reconsideration was filed with the Tribunal by counsel for Ms. Jang on July 6, 2006, more than nine months after the original decisions were decided. There is an issue concerning the timeliness of the application.
6. The substantive issue raised in this application is whether there was a breach of principles of natural justice arising from a failure by the Director, and the Tribunal, to ensure Ms. Jang understood the complaint and appeal processes and could adequately advocate her position in those processes. Counsel for Ms. Jang characterizes the issue as a breach of a duty of fairness owed to Ms. Jang by the Director, and the Tribunal, with the alleged breach arising from a failure to provide Ms. Jang with an interpreter during the complaint process administered by delegates of the Director and the appeal process before the Tribunal.
7. This application was accompanied by a two page submission filed by counsel for Ms. Jang. Additional material, comprising a copy of a Petition for judicial review of the Determination and the original decisions filed on behalf of Ms. Jang and the supporting affidavit sworn by Ms. Jang has been submitted by counsel for the Director in her response to this application. Counsel for the Director has also submitted an affidavit of Amanda Welch, one of the delegates involved in administering the complaints, and an affidavit from Ms. Adele J. Adamic, a lawyer with the Legal Services Branch, Ministry of the Attorney General. Counsel for Ms. Jang has filed a final reply.
8. I have reviewed and considered this material in deciding the application.

ISSUE

9. In any 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. In this case, that threshold issue includes an issue concerning the timeliness of the application. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application is stated above.

FACTS

10. Some review of the facts is necessary. I do not intend to recite all of the assertions of fact. I have reviewed the Determinations, the record, the appeals, the original decisions and the material presented on this application. There are facts which present themselves as more important than others to the issues raised in this application.

11. In the Petition for judicial review and the supporting affidavit, it is stated that Ms. Jang is a businesswoman operating a restaurant in Prince Rupert, that she has the ability to speak a limited amount of English but not to the extent of being able to receive and review correspondence, comply with written legal notices and instructions nor attend by telephone or in person without an interpreter and articulate a legal position or defence in a hearing.

12. In her affidavit, Ms. Jang affirms she has difficulty understanding day to day conversations in English and says she is unable to understand technical or legal language presented in English. Concerning her involvement in discussing the complaints with delegates of the Director, Ms. Jang says, at paras. 13-15 of her affidavit:

13. I telephoned the Employment Standards office in the City of Prince George, in the Province of British Columbia regarding the Respondent Chuck Lap Ng and gave an account of my version of what had occurred based on my understanding of Chuck Lap Ng's claim.
14. My understanding of Chuck Lap Ng's claim was that I was going to be sued by the Director of Employment Standards and I telephoned the Director of Employment Standards in the City of Prince George, in the Province of British Columbia to provide my version of events to prevent the lawsuit from being commenced.
15. I undertook the same course of action described in paragraphs 13 and 14 of this my affidavit for the Respondent Jordan Stewart except that I telephoned the delegate of the Director of Employment Standards in the City of Terrace, in the Province of British Columbia.

13. Ms. Jang says she did not realize that she was attending a hearing by telephone. In fact she was not. The Determination was issued following an investigation. There was no oral hearing on the complaint.

14. On this point, in view of Ms. Jang's assertion that she spoke with delegates in Prince George and Terrace and gave her version of what had occurred with Mr. Ng and Mr. Stewart, it is relevant to note that Section 77 of the *Act* states:

77. If an investigation is conducted, the director must make reasonable efforts to give the person under investigation an opportunity to respond.

15. Ms. Jang says she had her accountant, Mr. Larry Eastwood, assist her with appealing the Determination to the Tribunal. Ms. Jang filed two appeals on the Determination, one in respect of Chuck Lap Ng and one in respect of Jordan Stewart. Both were filed within the time limit provided in the *Act* and complied with the requirements of subsection 112(2). The appeals were delivered in English, with no indication on them that Ms. Jang did not understand the nature of the process that had taken place up to that point or the nature of the appeal process she was commencing before the Tribunal.
16. The appeals were decided by the Tribunal from the Record and the written submissions of the parties without an oral hearing. It should be noted that the Tribunal is not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* ("ATA") including section 36 which states, in part: ". . . the tribunal may hold any combination of written, electronic and oral hearings" (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). An oral hearing was not necessary to decide the appeals. No issue has been taken with that decision.
17. Ms. Jang says she does not believe a translator was ever offered to her by the Director or the Tribunal. That recollection conflicts with that of Ms. Welch, who says that during a 30-40 minute telephone conversation with Ms. Jang on May 6, 2005, she offered to meet in person with her, "and with someone who could translate". The offer was rejected, with Ms. Jang saying, "she understood . . . "just fine" and did not need a translator" (Welch affidavit, para. 27).
18. Ms. Jang says she did not appreciate the nature of either the complaint process or the appeal process. I am summarizing the effect of various assertions in her affidavit and in submissions made by her counsel.
19. The affidavit of Ms. Welch speaks to four telephone conversations between her and Ms. Jang and one other "long conversation" between Ms. Jang and another delegate. The latter information is provided on information and belief. The affidavit also speaks of several written communications sent by representatives of the Director to Ms. Jang whose receipt, and in some cases content, was acknowledged by Ms. Jang. As an example of the receipt and acknowledgement of the content of written communications sent to Ms. Jang is the Demand for Employer Records, which was attached to a letter sent by Ms. Welch on April 12, 2005, and which Ms. Jang said in a conversation with Ms. Welch on May 6, 2005 she would not provide.
20. The appeals filed with the Tribunal, as indicated above, were delivered in English. The appeals address substantive aspects of the claims made by Mr. Ng and Mr. Stewart. As correctly noted in the original decision concerning Mr. Stewart, the appeal submission contained arguments which were, "in essence, a repeat of arguments made to the delegate at first instance". That appeal also asked the Tribunal to cancel the administrative penalties, which the appeal submission stated, "are too harsh, punitive against her and when weighted against the small amounts in question are very unfair".

ANALYSIS OF THE PRELIMINARY ISSUE

The Threshold Test

^{21.} The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

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.

^{22.} Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's 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 general approach to reconsideration is set out 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 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, in the vast majority of cases, is the original decision. The focus in this application is somewhat broader, as the applicant says the question of procedural fairness flows through both the complaint process conducted by the Director and the Tribunal's appeal process.

^{23.} Applying the above considerations, 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.

^{24.} 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.

25. 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.

Timeliness

26. The Tribunal considers the timeliness of an application in deciding whether to exercise its discretion under Section 116. In this case, there has been a delay in excess of nine months from the issuance of the original decisions to the filing of this application. That is a significant, and on its face an unreasonable, delay.
27. While there is no statutory time limit on applications for reconsideration, the Tribunal Rules provide that an application should be brought within 30 days of the appeal decision. The original decisions were made on September 26, 2005 and mailed the same day. Under Section 19 of the *Administrative Tribunals Act*, S.B.C. 2004, ch. 45, the original decisions were considered to have been received on October 3, 2005. This application was filed July 6, 2006.
28. Counsel for Ms. Jang attributes the delay to Ms. Jang's failure to understand the nature of the processes and their consequences. He says Ms. Jang, "first became cognizant" of the consequences of the complaint and appeal processes on or about April 19, 2006. In the material submitted to the Tribunal with this application, Ms. Jang deposes that she did not "understand" the process or the effect of the Director's and Tribunal's decisions until late April 2006. She does not say she did not receive the original decisions in a timely way.
29. There is some explanation for the delay from late April to the filing of this application. Even accepting there is a reasonable explanation that justifies some of the delay following April 19, 2006, the explanation does not account for all of it and, overall, even that delay is significant. Specifically, I note that Ms. Jang was, by April 28, 2006, able to provide instructions to counsel, obtain the services of an interpreter, have an affidavit prepared for her substantially setting out the course of events relating to the complaints from mid March 2005 to April 2006, review the facts set out in a Petition for Judicial Review and depose to the correctness of those facts. The delay through May, June and part of July is largely unexplained.
30. Recently, in *Anna-Liisa Koivistu operating as Finn Custom Aluminum*, BCEST #R085/06, the Tribunal has restated the principles that apply in the exercise of the Tribunal's discretion in reconsideration applications that are filed a significant period of time after the original decision has been made:

In BCEST #RD046/01, the Tribunal set out the following principles to be considered relating to timeliness of applications:

1. The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion
2. Where delay is significant, an applicant should offer an explanation for the delay...
3. Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone.
4. Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.

31. An untimely application can be considered prejudicial without evidence of actual prejudice.
32. On my view of the material, this is not a case that warrants reconsideration.
33. The significant delay by Ms. Jang in filing this application weighs against it.
34. As well, I am not satisfied there has been any procedural unfairness to Ms. Jang in the complaint or appeal process.
35. Ms. Jang's claim of denial of procedural fairness is related to three contentions: first, a claimed "difficulty" understanding day to day conversations; second, an inability to understand technical or legal language; and third, a limited ability to "receive, review and comply with written legal notices and instructions" or to attend a hearing and "articulate a legal position or defence".
36. The evidence, however, does not indicate Ms. Jang had any difficulty appreciating the claims being made against her by Mr. Ng and Mr. Stewart or communicating her response to those claims during the investigation. There is considerable evidence to that effect. Ms. Jang comes close to acknowledging as much in those paragraphs of her affidavit set out above. As well, there is the assertion made by Ms. Welch (which is not contradicted by Ms. Jang) that she suggested a personal meeting with Ms. Jang with a translator and was rebuffed by Ms. Jang, who said she understood just fine and did not need a translator (Welch Affidavit, sworn July 25, 2006, para. 27).
37. Counsel for Ms. Jang says it is relevant that Ms. Welch even made that offer and that it speaks to a concern by the delegate about a language barrier. I do not accept the suggestion of counsel for Ms. Jang that the affidavit filed by Ms. Welch speaks to any concern about a language barrier, but even if it did, the words attributed to Ms. Jang, and not denied, would have been sufficient to dispel that concern.
38. There is no indication in any of the material that Ms. Jang was unable, by reason of an alleged inability to comprehend the English language or express herself in that language, to communicate her position to the delegates of the Director on the claims made by Mr. Ng and Mr. Stewart and her obligation to provide the payroll information demanded by the delegates.
39. The sum of evidence as it applies to the complaint process speaks to three things: that Ms. Jang was given an opportunity to respond to the respective complaints; that she understood what the claims were; and that she had no valid defence to those claims. On the material before this panel, it would be incredulous for Ms. Jang to suggest she did not appreciate what the complaints were.
40. In respect of the appeal process, the evidence also strongly suggests Ms. Jang appreciated the nature of that process. There is no suggestion that Mr. Armstrong, an accountant who assisted Ms. Jang with the appeals, was making up the appeal arguments as he went along. The appeal submissions not only challenge the merits of the Determination on the respective complaints and seek to introduce new evidence concerning the validity of those complaints, but also challenge the administrative penalties imposed under the *Act* and *Regulations*.
41. Ms. Jang may not have fully understood the process. If so, she would not be alone. Many persons, both complainants and employers, do not fully understand or appreciate the process under the *Act*. That is one of the reasons why the Employment Standards Branch has developed facts sheets relating to provisions

and processes under the *Act*, several of which were provided to Ms. Jang, a web site and informational telephone numbers.

42. The Tribunal provides the same information and access to information in respect of its processes and procedures.
43. A less than complete understanding of the provisions of the *Act* and the process has not however, interfered with Ms. Jang's ability to participate in the complaint and appeal process and, specifically, to know the complaints being made against her and to respond to those complaints. Even if Ms. Jang did not completely understand the process, I can find no resulting unfairness to her, either in the context of principles of natural justice or against the statutory requirement found in Section 77 of the *Act*. In all relevant discussions, Ms. Jang was communicating her position on the complaints. If Ms. Jang felt she did not understand the complaints and felt she was unable to adequately communicate her position, she could have said so. She did not. In fact she said she did understand.
44. In the circumstances, I can see no basis for finding the Director, or on the Tribunal, was obligated to provide the assistance of an interpreter to Ms. Jang. There are no objective facts which demonstrate that an interpreter was a necessary element to ensuring procedural fairness to Ms. Jang.
45. The circumstances relating to the complaint process are described above.
46. From the perspective of the Tribunal, the only communications that were made to the Tribunal were in English and nothing in the communications to the Tribunal indicated Ms. Jang could not adequately communicate in English. In its rules, the Tribunal has a provision for allowing an individual engaged in an oral hearing to request the assistance of an interpreter. There was no oral hearing in this case. The appeal process was conducted by the Tribunal, as it frequently is, on the written submissions made to the Tribunal by the parties involved and the Record filed by the Director under subsection 112(3) of the *Act*. Ms. Jang expressed her position in the written submissions.
47. Having reviewed the material, I am not persuaded that a reconsideration of the matter is warranted. Not only is there a significant delay which is largely unexplained, but I am unable to find there is a clear and compelling case on the substantive issue. Finally, I am not convinced there is any merit in engaging in a further consideration of the arguments that have been raised by Ms. Jang to date against the claims made by Mr. Ng and Mr. Stewart. Those claims have been found to be meritorious and the arguments against those claims made by Ms. Jang have been found to be without substance. The Determination and the result of the appeal process are clearly unassailable in that respect.
48. This application is denied.

ORDER

- ^{49.} Pursuant to Section 116 of the *Act*, I order the original decisions be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal