

An Application for Reconsideration

- by -

Liu Liu Enterprises Ltd. carrying on business as Moutai Plus Restaurant
(“Moutai”)

- 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.: 2017A/118

DATE OF DECISION: October 23, 2017

DECISION

SUBMISSIONS

Min Fang Liu

on behalf of Liu Liu Enterprises Ltd. carrying on business
as Moutai Plus Restaurant

OVERVIEW

1. Liu Liu Enterprises Ltd. carrying on business as Moutai Plus Restaurant (“Moutai”) seeks reconsideration of a decision of the Tribunal, BC EST # D095/17 (the “original decision”) dated August 28, 2017.
2. The original decision considered an appeal of a Determination issued by Dan Armstrong, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on June 13, 2017.
3. The Determination was made by the Delegate on a complaint filed by Gui Lan Yang (“Ms. Yang”) who had alleged Moutai had contravened the *Employment Standards Act* (the “*ESA*”) by failing to pay all wages and entitlements owing to her at the time of her termination of employment.
4. In the Determination, the Delegate found Moutai had contravened sections 40, 45, 58 and 63 of the *ESA* and was ordered to pay Ms. Yang wages in the amount of \$7,399.08, an amount which included interest under section 88 of the *ESA*, and administrative penalties in the amount of \$3,000.00.
5. An appeal of the Determination was filed by Moutai alleging the Director failed to observe principles of natural justice in making the Determination.
6. While the appeal was grounded in an alleged failure by the Director to observe principles of natural justice, the appeal did no more than dispute findings made by the Delegate – that Ms. Yang was owed overtime wages and compensation for length of service – and reiterate arguments made to the Delegate on those two matters during the complaint process that were not accepted by the Delegate.
7. The Tribunal Member making the original decision correctly noted the burden of showing the Director had failed to observe principles of natural justice was on Moutai, found the appeal did not identify any natural justice concerns in the process leading to the Determination, that, consequently, the burden had not been met and dismissed the appeal. In so doing, the Tribunal Member stated, after referencing a comment by the Tribunal in *099368 B.C. Ltd. carrying on business as Bear Mountain Liquor*, BC EST # D097/16:

. . . the delegate of the Director preferred the evidence of Ms. Yang over Moutai’s where there was conflicting evidence and I find the conclusions of fact reached by the delegate on each of the questions he decided in the Determination well-reasoned and amply supported in the evidence presented.
8. The Tribunal Member dismissed the appeal under section 114 of the *ESA*, concluding the appeal had no reasonable prospect of succeeding.
9. This application was delivered to the Tribunal on September 29, 2017, two days after the expiry of the statutory appeal period for reconsideration applications found in section 116(2.1) of the *Act*. In correspondence dated October 4, 2017, Moutai was asked to provide written reasons for the delay in filing the application and given a deadline of October 13, 2017, to do so. Nothing has been received from Moutai.

In correspondence dated October 16, 2017, the Tribunal advised Moutai the application was proceeding to decision.

ISSUE

10. 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 *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

11. Moutai has done nothing more in this application than resubmit the same arguments made unsuccessfully to the Delegate and, also without success, to the Tribunal Member making the original decision.

ANALYSIS

12. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.

13. Section 116 of the *ESA* reads:

- 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 served with an order or a decision of the tribunal may make an application under this section.
- (2.1) The application may not be made more than 30 days after the date of the order or decision.
- (2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.
- (3) An application may be made only once with respect to the same order or decision.
- (4) The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.

14. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *ESA*. One of the purposes of the *ESA*, found in section 2(d), is “to provide fair and efficient procedures for resolving disputes over the application and interpretation” of its provisions. Another stated purpose, found in section 2(b) is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Inc.*, 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 a 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” not be 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 favour of persons with greater resources, who are 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 timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an application. 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 itself 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 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 in the reconsideration.
19. I find this application does not warrant reconsideration.
20. This application is a textbook example of circumstances where the Tribunal will not grant reconsideration.
21. In addition to being filed outside of the statutory time period for filing reconsideration applications, the application is entirely grounded in a challenge to conclusions of fact made in the Determination, confirmed in the original decision as being “amply supported in the evidence”. It seeks to have this reconsideration panel of the Tribunal re-visit the result of the original decision and come to a different conclusion without demonstrating any error in the original decision, which, I add, found Moutai had shown no reviewable error in the Determination.
22. The application is denied.

ORDER

23. Pursuant to section 116 of the *ESA*, the original decision, BC EST # D095/17, is confirmed

David B. Stevenson
Member
Employment Standards Tribunal