

An Application for Reconsideration

- by -

Par-Mel Enterprises Inc. carrying on business as The Maids Home Services
(“Par-Mel”)

- 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: Carol L. Roberts

FILE No.: 2011A/143

DATE OF DECISION: November 29, 2011

DECISION

SUBMISSIONS

Bruce Melissen	on behalf of Par-Mel Enterprises Inc. carrying on business as The Maids Home Services
Christina Starkie	on her own behalf
Mica Nguyen	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Par-Mel Enterprises Inc. carrying on business as The Maids Home Services (“Par-Mel”) for a reconsideration of BC EST # D092/11 (the “Original Decision”), issued by the Tribunal on August 23, 2011.
2. Christina Starkie filed a complaint of unpaid wages against Par-Mel on February 26, 2008. After investigating the complaint, the Director of Employment Standards determined that Par-Mel had contravened sections 17, 40, 45, 46, 58 and 63 the *Employment Standards Act* (the “*Act*”) and ordered Par-Mel to pay Ms. Starkie \$7,813.39, representing wages and interest. The Director also imposed six administrative penalties for each of the contraventions. The total amount of the Determination was \$10,813.39.
3. Par-Mel appealed the Determination on the grounds that the Director erred in law and failed to comply with the principles of natural justice. Par-Mel was represented by counsel on appeal, Ms. Starkie represented herself.
4. Par-Mel’s major arguments were that the Director failed to adequately assess Ms. Starkie’s credibility, misinterpreted section 22 of the *Act* regarding Ms. Starkie’s written assignment of wages, improperly preferred Ms. Starkie’s records of payment made and hours worked over Par-Mel’s records and erred in finding that regular hours of work could not be banked even if both parties agreed. Par-Mel also contended that the Director wrongly imposed excessive administrative penalties.
5. After reviewing the appeal submissions and the record, the Member upheld the Determination. The Member found no basis to disturb the Director’s findings of fact, concluding that Par-Mel had not demonstrated the Director had made a palpable or overriding error. The Member found no error in the Director’s interpretation or application of the *Act*, including the Director’s imposition of administrative penalties.

ISSUES

6. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENT

7. Par-Mel seeks reconsideration of the Original Decision for a number of reasons including:

- Ms. Starkie was fairly compensated while employed by Par-Mel and should not be awarded any additional compensation;
 - Ms. Starkie’s character should be questioned based on the inconsistencies in her evidence;
 - Par-Mel did not knowingly contravene the *Act* and the administrative penalties should not be imposed;
8. Par-Mel included additional facts and exhibits for “clarification purposes” in support of its argument that the Determination was “unjust and flat out wrong”.
 9. Par-Mel also contended that the fact it voluntarily dissolved its incorporated company prior to the issuance of the Determination had some bearing on the delegate’s decision.
 10. Par-Mel’s application sets out lengthy reasons why it disagrees with the Determination.
 11. The Director opposes the application, contending that Par-Mel has not raised any questions of law, fact, principle or procedure that are so significant that they should be reviewed because of their importance to the parties or their implications for future cases. The Director contends that Par-Mel’s application is nothing more than an attempt to re-argue the case advanced before the Director at first instance.
 12. Ms. Starkie also seeks to have the application for reconsideration dismissed.

ANALYSIS

13. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (the “*Act*”) confers an express reconsideration power on the Tribunal. Section 116 provides
 - (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.

1. The Threshold Test

14. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
15. In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

16. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The member fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;
 - The Decision is not consistent with other Decisions based on similar facts;
 - Some significant and serious new evidence has become available that would have led the member to a different decision;
 - Some serious mistake was made in applying the law;
 - Some significant issue in the appeal was misunderstood or overlooked; and
 - The Decision contains a serious clerical error.
- (*Zoltan Kiss*, BC EST # D122/96)
17. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.
18. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration will in general be with the correctness of the decision being reconsidered.
19. In *Voloroso* (BC EST # RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:
- ... the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute ...
20. 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 favour 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.
21. One of the issues to be considered in a Reconsideration application is the timeliness of the application. The Tribunal will consider delay in deciding whether to exercise the reconsideration discretion and where delay is significant, an applicant should offer an explanation for the delay. An unexplained delay will militate against reconsideration. (*The Director of Employment Standards (Re Primadonna Ristorante Italiano)*, BC EST # RD046/01)
22. Par-Mel’s application was made on September 27, 2011, 34 days after the Decision was issued. While I do not find the four day delay to be significant, I find that Par-Mel has not met the threshold test for exercising the reconsideration power.
23. Although Par-Mel’s application is for a reconsideration of the Original Decision, issued by the Tribunal on August 23, 2011, its submissions consist largely of a restatement of the arguments it made before the Director

as well as the arguments that were made on appeal. Par-Mel continues to assert that the Determination was “wrong”, despite the conclusions of the Member. However, there is nothing in Par-Mel’s application that addresses any of the factors set out above regarding the exercise of the reconsideration power; indeed, its submissions do not refer to the Original Decision.

24. The Member in the Original Decision carefully reviewed the Determination’s factual findings and conclusions. He considered the arguments advanced by Par-Mel’s counsel and found no basis to interfere with the Determination.
25. Although Par-Mel submitted new documents with its reconsideration application, it is clear those documents were available at the time the Director was investigating the complaint as well as during the appeal. I note that the investigation was conducted over a two year period and Par-Mel had ample opportunity to provide this information during that period. Furthermore, some of the documentation was specifically sought in a Demand for Employer Records and was not provided.
26. In my view, Par-Mel has failed to demonstrate that this is an appropriate case for the exercise of the Tribunal’s reconsideration power. I am not persuaded, in reviewing the Determination, the arguments made on appeal, the Original Decision and the submissions on the application for reconsideration, that Par-Mel has raised significant questions of law that should be reviewed because of their importance to the parties and or their implications for future cases.

ORDER

27. Pursuant to section 116 of the *Act*, the application for reconsideration is denied.

Carol L. Roberts
Member
Employment Standards Tribunal