Employment Standards TRIBUNAL

An Application for Reconsideration

\- by -

662372 B.C. Ltd. operating as Metropole Pub
(the “Employer”)

\- 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:	Kenneth Wm. Thornicroft
FILE No.:	2005A/126
DATE OF DECISION:	September 8, 2005

DECISION

SUMBISSIONS

Amman Rawji	for 662372 B.C. Ltd.
Lynne L. Egan	for the Director of Employment Standards

INTRODUCTION

1. This is an application filed by 662372 B.C. Ltd., operating as the "Metropole Pub" (the "Employer"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Member's decision issued on June 30th, 2005 (B.C.E.S.T. Decision No. D091/05). The Tribunal Member confirmed a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on March 23rd, 2005 pursuant to which the Employer was ordered to pay its former employee, Jennifer L. Openshaw ("Openshaw"), $1,346.64 in unpaid wages and section 88 interest and a further $3,500 in administrative penalties (the "Determination").

2. This application is being adjudicated based solely on the parties' written submissions. I have reviewed the record that was before the Tribunal Member as well as the Member's Reasons for Decision and the submissions of the applicant and the Director's delegate.

PREVIOUS PROCEEDINGS

The Determination

3. The Employer operates the "Metropole Pub" as part of a larger hotel business. Ms. Openshaw, who worked at the pub as both a server and bartender, filed a complaint against the Employer alleging that it had failed to pay her regular wages, overtime pay, statutory holiday pay and had taken certain unauthorized deductions from her wages. Sometime later, she added a further claim for unpaid vacation pay.

4. An oral hearing regarding Ms. Openshaw's complaint was held on March 15th, 2005. Although the Employer was notified about the hearing (letters were forwarded to both the Employer's business and registered/records office) the Employer did not appear at the hearing. The Employer's registered/records office is also the residential address of its two directors Amman Rawji and Ghalib Rawji. I might add that the Employer also failed to comply with a Demand for production of Ms. Openshaw's payroll records. Ms. Openshaw testified at the hearing and her evidence was corroborated, in part, by her wage statements prepared by the Employer (e.g., failure to pay statutory holiday pay; unauthorized wage deductions).

5. The delegate accepted Ms. Openshaw's testimony and, accordingly, awarded her $62 on account of unpaid regular wages, $216 for statutory holiday pay for two holidays that she worked, $22.50 for overtime pay, $161.22 for vacation pay, $852 to reimburse her for unauthorized wage deductions, and $32.92 for section 88 interest (total = $1,346.64).

6. In addition, the delegate levied seven separate $500 administrative penalties in light of the Employer's failure to comply with sections 18 (payment of wages), 21 (unauthorized wage deduction), 27 (wage statements), 40 (overtime pay), 46 (statutory holiday pay), 58 (vacation pay) of the *Act* and section 46 of the *Employment Standards Regulation* (production of payroll records).

The Appeal

7. The Employer specifically appealed the Determination on the ground that it had new evidence that was not available at the time the Determination was being made [section 112(1)(c) of the *Act*], however, the Tribunal also considered whether the Employer had been denied natural justice since this latter issue was implicitly argued in its appeal documents.

8. The appeal was adjudicated based on the parties' written submissions as provided for in section 103 of the *Act* and section 36 of the *Administrative Tribunals Act* (see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

9. The Tribunal Member found that the so-called "new evidence" (a termination letter) was available and could have been provided to the delegate during her investigation and that, in any event, the document had no legal force or effect as it constituted an attempt to "contract out" of the *Act* contrary to section 4. The Employer argued that it did not attend the hearing because its principal was not aware of the hearing date. However, the Member concluded that given the statutory presumptions regarding service of notices, coupled with the dearth of evidence provided by the Employer, one could infer that its failure to attend the hearing was a conscious and deliberate decision.

10. As for the administrative penalties, the Member concluded that they were all imposed in accordance with the Act and Regulation and that the Tribunal did not have any authority to reduce or waive any of the penalties in question.

THE APPLICATION FOR RECONSIDERATION

11. The Employer's Application for Reconsideration was filed on July 19th, 2005 and I am satisfied that it is a timely application. There is, however, absolutely nothing new in the application; the application simply represents a complete reiteration of arguments that were put before the Member with respect to its failure to attend the hearing before the delegate and the imposition of the administrative penalties.

12. Mr. Rawji states that he was out of town when the hearing notice arrived, however, he has not adequately explained why he did not turn his mind to the notice when he returned to town during the week of February 15th to 23rd, 2005 (the hearing was scheduled for March 15th, 2005) nor does he explain why the other corporate director did not deal with the notice. Further, the Employer's offer to pay certain (but not all) claims after the complaint had already been filed cannot stand as a lawful defence to the imposition of the penalties. The conduct relating to the penalties had already occurred when the Employer's settlement offer was made. I might add that these identical arguments were put before the Member and addressed by him. I fully concur with the Member's Reasons for Decision as it relates to these latter issues.

13. Furthermore, there is nothing in the material before me that would call into question the correctness of the Determination insofar as it relates to the calculation of Ms. Openshaw's unpaid wage claim or the imposition of the administrative penalties.

14. The Tribunal has consistently held that applications for reconsideration should succeed only if there has been a demonstrable breach of the rules of natural justice, there is compelling new evidence that was not available at the time of the appeal hearing, or if the Tribunal has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact, or reargue legal conclusions, unless such factual findings can be characterized as lacking any evidentiary foundation whatsoever, or the legal conclusions are clearly wrong (neither of which is the case here). In my view, this application does not raise an issue or argument that justifies the Tribunal exercising its discretion to reconsider the decision in question—see *Director of Employment Standards (Re Milan Holdings Ltd.),* B.C.E.S.T. Decision No. D313/98.

ORDER

15. Pursuant to Section 116 of the *Act*, the application to reconsider the decision of the Tribunal Member in this matter is **refused**.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal