Employment Standards TRIBUNAL

An application for Reconsideration

- by -

Fiction Restaurant Ltd.
(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: Alison H. Narod

FILE No.: 2005A/108

DATE OF DECISION: September 14, 2005

DECISION

1. This is an application by Fiction Restaurant Ltd. ("Fiction" or the "Employer") under Section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Decision #D065/05 (the "Original Decision"), issued by the Tribunal on May 13, 2005.

2. Section 116(1) of the *Act* provides:

> (1) On application under subsection (2) or on its own motion, the tribunal may
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> (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.

3. In the Original Decision, a Tribunal Member dismissed the Employer's appeal of a Determination made by a delegate of the Director of Employment Standards (the "Delegate"), dated February 18, 2005, in which the Delegate found that the Employer contravened Sections 18, 58, 21 and 25 of the *Act* in failing to pay its former employee, Mr. Wernbacher (the "Employee"), one week's regular wages, compensation for unauthorized deductions and laundry costs, and vacation pay. The Delegate held that the Employee was entitled to wages, including interest, in the amount of $2,863.63. Additionally, the Delegate imposed a penalty totalling $2,000.00 on the Employer for the contraventions of the *Act*, pursuant to Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*").

4. The Employer's reasons for requesting a reconsideration are that there is significant new evidence not previously available to the process to this point that would clearly have led the Member to a different decision. This evidence is comprised of the following:

- eight cancelled cheques variously dated between June 18, 2003 and October 15, 2003, which are said to illustrate that the Employee's wages were paid to him bi-monthly, not bi-weekly, on the 1st and 15th of each month;
- a table of calculations said to outline an error in math in the Determination that is based on an assumption that the Employee was paid bi-weekly rather than bi-monthly;
- the Employee's payslip for his last period of work, said to demonstrate that his pay period was bi-monthly, rather than bi-weekly;
- a cancelled cheque for $2,700.00, said to reference a loan made to the Employee that was never repaid; and
- a cancelled cheque to a linen company, said to support the Employer's claim that it never agreed to reimburse the Employee for the costs of cleaning his uniforms, because it paid a company to launder its staff uniforms.

5. The Employer's explanation for the late filing of this evidence is that its principal, Sean Sherwood, was unable to attend the hearing that led to the Original Determination. This inability meant that none of the evidence now submitted was previously seen or heard. It was Mr. Sherwood's inability to attend that led

to the unavailability of the evidence. The reasons for the Employer's inability to attend are not specified in the Employer's submissions on the Request for Reconsideration. However, they are discernible from the submissions made to the Member and were that Mr. Sherwood's spouse was seriously ill at the time.

The Member's Decision

6. As noted, the Determination required the Employer to pay the Employee an amount totalling $2,863.63 for various contraventions of the *Act*, as well as a $2,000.00 penalty in respect to those contraventions.

7. On appeal, the Employer argued that new evidence had become available that was not available at the time the Determination was made. The Employer's principal, Mr. Sherwood, contended that he was unable to attend at the oral hearing that led to the Determination because of the serious illness of his spouse. The Delegate proceeded with the hearing, despite Mr. Sherwood's absence. The Employee attended the hearing on his own behalf and made submissions and argument. No one appeared for the Employer and, therefore, none of the new evidence the Employer sought to adduce at the time of the appeal was submitted. It should be noted that the documentary evidence now said to be new was not submitted on appeal.

8. Accordingly, the only issue before the Tribunal, on appeal, was whether or not the evidence that the Employer sought to adduce at that time was new evidence that had become available that was not available at the time the Determination was being made, as a result of the Employer's failure to attend the hearing.

9. The facts, as found by the Member, indicated that the Employee submitted his Complaint Form to the Employer and the Delegate on November 23, 2003. The Employer was contacted by the Delegate on at least one occasion, and indicated it would reply to the Complaint. The Delegate made a number of attempts over a period of approximately six months to obtain relevant records from the Employer, without success. The Employer replied to the Complaint by letter fax-dated February 16, 2004 challenging the accuracy of the Employee's allegations. However, no documents were produced. On June 20, 2004, the Delegate issued a Determination imposing a $500.00 penalty for the Employer's failure to produce records contrary to Section 46 of the *Act*. The Employer received the Determination and successfully appealed it (BCEST #D024/05).

10. The hearing that led to the Determination was set for October 14, 2004. Notice of that hearing was sent to the Employer at its Registered and Records office. That Notice included a request to submit all reliance documents prior to the hearing.

11. The Employer failed to attend at the hearing. The Delegate attempted to contact the Employer by phone, unsuccessfully, before proceeding to conduct the hearing in the Employer's absence. The Employee attended and submitted evidence and argument. The Employer failed to do the same, because of its absence. In the result, the Delegate issued the Determination of February 18, 2005, referred to earlier.

12. On appeal, the Employer argued that new evidence had become available that was not available at the time the Determination was made. Mr. Sherwood made written submissions on behalf of the Employer. He said he did not attend the hearing due to the extenuating circumstances referred to earlier. Mr. Sherwood made submissions in response to the Employee's allegations, but he provided no documentary evidence in support.

13. The Member considered the grounds set out in the Section 112(1) of the *Act* on which a person may appeal a determination. They included the ground that evidence has become available that was not available at the time the determination was being made. In this regard, the Member set out the four conditions that the Tribunal has held must be met before new evidence will be considered. More specifically, the Member said that the Appellant must establish that:

> 1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> 2. the evidence must be relevant to a material issue arising from the complaint;
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> 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
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> 4. the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

14. The Member acknowledged and sympathized with Mr. Sherwood's extenuating circumstances. She also noted the Employer's failure to respond to the Delegate's efforts to obtain employer records over a period of many months. She said that the Employer provided no good reason why it could not have appeared at the hearing through a representative other than its principal, Mr. Sherwood, and it provided no evidence other than Mr. Sherwood's assertions as to the extenuating circumstances, such as hotel receipts, gas bills or medical evidence. The Member went on to make the following findings:

> I find Fiction knew about the hearing, and failed to appear. The Delegate was entitled to conduct the hearing in Fiction's absence. Fiction could have provided written submissions in advance of the hearing, as it was required to do. It did not. Fiction could have asked for an adjournment, by fax, in writing, or through a representative. It did not. It is also possible Fiction could have avoided the hearing entirely by submitting documents in support of the position it now advances. It did not.
>
> I find no grounds for the appeal.

Reasons

15. As noted above, on this reconsideration, the Employer again argues that there is significant new evidence now available that was not available to the process to this point and that this new evidence that would clearly have the led the Member to a different decision. The evidence has been summarized above. In response, the Delegate says that the grounds for reconsideration are the same grounds that were asserted in the appeal, namely, new evidence has become available that was not available at the time of the Determination being made. Additionally, the Delegate says that the Application for Reconsideration is the Employer's attempt to re-weigh evidence already considered. (I note that the Employer did not supply the alleged new evidence to the Tribunal until after the Delegate filed his response.)

16. The Tribunal exercises its power to reconsider decisions under Section 116 only in exceptional circumstances. It uses its discretion to reconsider 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."

17. The Tribunal undertakes a two-stage analysis in the reconsideration process (*Milan Holdings* (BC EST #D313/98)). In the first stage, the reconsideration panel decides whether the matters in the application in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the appellant 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. In the second stage, the reconsideration panel considers whether to grant the request to vary or cancel the Member's decision.

18. Among other things, the grounds for varying or cancelling a decision include that some significant and serious new evidence has become available that would have led the Member to a different decision. As mentioned earlier, this is the ground relied on by the Employer in the instant case.

19. The Tribunal has noted that reconsideration is not a right, but is discretionary. The reconsideration process is not intended to allow parties another opportunity to re-argue their case. Nor is it intended to allow the parties simply to have the Tribunal "re-weigh" evidence previously considered or dismissed by the Member or to seek a "second opinion" when a party simply does not agree with the Member's decision (*Zoltan Kiss* (BC EST #D122/96)).

20. In the instant case, I am unable to find that the Member made any error in the course of rendering the Decision or in the Decision itself. The Member considered the evidence and submissions before her.

21. As mentioned, the Employer argued on appeal that there was new evidence which had not previously been considered as a result of its inability to attend the hearing before the Delegate, due to extenuating circumstances. Despite the Employer's assertion that there was new evidence, no new documentary evidence was produced. Additionally, there was nothing in the written submissions made by the Employer that amounted to evidence that was not previously available, with due diligence, prior to the Determination that met the conditions for being considered as new evidence. Indeed, the Delegate made repeated attempts over a period of many months to obtain employer records such as the evidence which has recently been produced.

22. The Employer's submissions and documentation could have been produced to the Delegate in advance of or at the hearing by means other than Mr. Sherwood's personal attendance at that hearing. Mr. Sherwood could have made the Employer's submissions and provided its documentation in writing prior to or at the hearing. Alternatively, the Employer could have arranged for another individual to attend at the hearing to make submissions and supply documentary evidence. Finally, the Employer could have sought an adjournment of the hearing until such time as Mr. Sherwood could have attended to provide submissions and documentary evidence. Therefore, there is no reasonable justification for the Employer's failure to supply any documents the Employer claimed, on appeal, were "new" in support of its position at the hearing before the Delegate.

23. Moreover, the Employer knew by the time of the appeal of the Determination of February 18, 2005 that its documentation ought to be produced. By that time, it had commenced an appeal of the Determination requiring production of employer records. There is no explanation of why no documents were supplied in support of the Employer's appeal.

24. Accordingly, I am unable to find that the Member erred.

25. Turning to the question of whether the documentary evidence now produced is "new" evidence that may be considered on reconsideration, I note that the Employer admits that the documentary evidence now submitted and alleged to be "new" was not previously submitted, at all. That evidence, save the table of calculations, existed at the time of the original hearing before the Delegate. The table of calculations contains information that could have been produced before or at the original hearing. It is more in the nature of argument than evidence. In short, all of the allegedly new evidence could have, with the exercise of due diligence, been produced before or as part of the Employer's appeal. There is no reasonable justification for the Employer's failure to produce it at some period of time in advance of the appeal. Accordingly, this evidence does not qualify as evidence that was not previously available that may be considered on reconsideration.

26. Nor can I conclude that the evidence, if submitted on appeal, would have led the Member to a different conclusion. The "new" evidence is either of little assistance or does not support the assertion that the Delegate or the Member erred, for the reasons set out below.

1) error in calculation of wages

27. The Employer submits various cancelled cheques and the Employee's final payslip in support of an allegation that the Delegate based his calculations of the Employee's wages on an assumption that he was paid bi-weekly, when in fact he was paid bi-monthly.

28. The Delegate concluded that the Employee was not paid for his last week worked. In calculating the wages owed for this last week, the Delegate said he would "use the stated $1,408.00 semi-monthly wage on the October 26, 2003 payslip". He then said the Employee was "owed 1 weeks wages equal to $649.84".

29. I note that if the amount of $1,408.00 is a semi-monthly payment of wages, the weekly equivalent of same is $694.84 ($1,408 x 2 = $2,816 per month; $2,816 x 12 = $33,792 per year; $33,792 ÷ 52 = $649.84). Accordingly, the Delegate based his calculations on the assumption the Employee was paid bi-monthly. Therefore, the new evidence does not assist the Employer's argument.

2) vacation pay

30. The Employer says no vacation pay is owed to the Employee because he was given a loan of $2,700.00, which was never repaid. Therefore, if the vacation pay that was owed ($727.82) is set off against that amount, then the Employee was overpaid $1,972.18 and he owes the Employer that amount.

31. There are two difficulties with this argument. First, the *Act* does not permit such set-offs without compliance with s.21 and s. 22 of the *Act*. That is, the Employer is not permitted to set off employee debts against wages owed (which includes vacation pay owed) without the Employee's written assignment or unless otherwise authorized by s. 22. Second, the loan was given to the Employee to assist the Employee in a trip to Europe. The Employer acknowledged in its February 16, 2004 letter that it had not paid the Employee vacation pay in respect of his trip to Europe. Accordingly, the loan had nothing to do with the Employee's entitlement to vacation pay and ought not, now, to be treated as if it were vacation pay.

32. If the Employer wishes to collect unpaid debts owed to it by the Employee, there may be other legal avenues available to it. The *Act* is not an avenue for collection of employee debts without proper authorization.

3) laundering charges

33. The Employer supplies a cancelled cheque in support of its claim that it provided laundering services to its employees. This cheque corroborates the Employer's assertion to the extent that it shows money was paid to a linen company. Unfortunately, the cheque does not indicate what services were provided and, in particular, whether these services included laundering employee uniforms. Accordingly, although the evidence may have some corroborative value, it is not compelling evidence that there was no agreement between the Employer and the Employee to reimburse the Employee for his laundering costs.

34. In short, I am not persuaded that this evidence is significant and serious new evidence that would have led the Member to a different decision.

Summary

35. While I, like the Member, am sympathetic to Mr. Sherwood's extenuating circumstances, the evidence now alleged to be "new" does not meet the Tribunal's well-established tests for consideration as significant and serious new evidence that would have led the Member to a different decision. It is unfortunate that it has taken the Employer until this point in the proceedings to produce this evidence. However, that is entirely the Employer's fault and it must bear the consequences.

36. The application for reconsideration is dismissed.

Alison H. Narod
Member
Employment Standards Tribunal