

An Application for Reconsideration

- by -

Wolfgang Hirschfelder
("Hirschfelder")

- 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

ADJUDICATOR: April Katz

FILE No.: 2003/7

DATE OF DECISION: June 9, 2003

DECISION

OVERVIEW

This application for reconsideration was filed by Wolfgang Hirschfelder, (“Hirschfelder”) a former employee of 534176 B.C. Ltd. operating as Coast Spas Manufacturing Inc. (“Coast Spas”). Hirschfelder is seeking reconsideration of Tribunal Decision #D024/03, which confirmed a Determination of the Director of Employment Standards (“Director”) that he was not entitled to additional wages for overtime. Hirschfelder worked as a security guard for Coast Spas for a year. Hirschfelder worked 8 1/2 hours Monday through Thursday and 8 hours on Fridays. Hirschfelder feels that the 1/2 hour each Monday through Thursday was overtime. The Determination found the 1/2 hour each day was an unpaid meal break and the Tribunal Decision confirmed this finding. The request for reconsideration challenges the conclusions on these findings in the Tribunal Decision and the Determination. The Determination and the Tribunal found that Hirschfelder signed an employment agreement which provided that he worked 8 1/2 hours Monday to Thursday with a half hour meal break.

Hirschfelder felt the Director and the Tribunal failed to consider the evidence that he did not leave the work site for a break until the end of his shift when he was replaced. He argues that the decisions made an error of law, were faulty and prejudicial in giving too much weight to the employer and that the Tribunal improperly interpreted a letter from Coast Spas and did not reflect the evidence.

This matter proceeded by way of written submission.

ARGUMENT

Hirschfelder argues that he was hired to be a security guard working on his own and that he could not leave his work until he was replaced. As a result of these conditions he did not have a meal break until his eight-hour shift was completed. He argues the evidence from the cafeteria receipts show that he took his meal breaks after his shift ended and not after 4 hours of work. He argues that the *Employment Standards Act* (“Act”) was breached by the failure of Coast Spas to give him a meal break after 4 hours and that he should receive overtime pay for each day he worked for 8 1/2 hours.

Hirschfelder submits that he is entitled to be paid for the meal break because his meal break was interrupted on many occasions when he was called away by the employer. He argues that the Act requires him to be paid if he must be available to the employer. Hirschfelder told the Director’s Delegate about being called and that his notes to this effect were at Coast Spas. The Director’s Delegate questioned Coast Spas and accepted Coast Spas’ review of the records and conclusion that Hirschfelder was only called once. Hirschfelder argues that the Director’s Delegate conducted a faulty investigation which favoured Coast Spas when the Delegate accepted this oral evidence from Coast Spas without reviewing the notes as part of the investigation.

Hirschfelder argues that the Tribunal Decision erred in ignoring a letter from Coast Spas which stated that another employee who worked a 10 hour shift was paid for all his hours because production was closed. Based on this criteria, Hirschfelder argues he should also have been paid as production was closed during his shift.

Coast Spas argues that Hirschfelder knew how his time was allocated from the beginning. Coast Spas argued that Hirschfelder was given a copy of all the rules and procedures and signed it on May 7, 2001

that he had read and understood all the above rules and conditions. One of the rules for Quality and Production set out that the work day was 8 1/2 hours consisting of a half-hour, non paid, lunch break after four hours of work and two fifteen minute, paid, rest breaks. Coast Spas argued that the onus was on Hirschfelder to take his 1/2 hour break and that no one suggested he needed to stay at work or on duty during this period.

THE FACTS

The facts and history of the complaint are not in dispute and are set out in the Determination and the Tribunal decision.

ANALYSIS

THE LAW

Reconsideration

Tribunals have written extensively about the basis for a reconsideration. Section 116 of the Act states:

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) *cancel or vary the order or decision or refer the matter back to the original panel.*

The power to reconsider orders and decisions under Section 116 is a discretionary power that is exercised with caution. The Tribunal has adopted limited grounds for reconsideration of decisions. Those grounds include

- (a) a failure by an adjudicator to comply with principles of natural justice;
- (b) where a mistake of fact has been made;
- (c) where a decision is inconsistent with other decisions not distinguishable on the facts;
- (d) where significant and serious new evidence has become available that had such evidence been presented to the adjudicator it would have lead the adjudicator to a different conclusion;
- (e) serious mistake in applying the law;
- (f) misunderstandings or failure to deal with a significant issue; and
- (g) a clerical error in the decision.

The purpose of the *Act* is “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act”, section 2(d). Allowing more than one hearing in a matter extends the proceedings and delays the remedy or resolution of the complaint. The Tribunal's authority is limited to confirming, varying or canceling a determination, or referring a matter back to the Director of Employment Standards under Section 115. The above reasons imply that a degree of finality is desirable. (See *Re: Kiss BC EST # D122/96*; *Re: Pacific Ice Company BC EST # D241/96*; *Re: Restaurontics Services Ltd. BC EST # D274/96*; and *Re: Khalsa Diwon Society BC EST # D199/96*).

The purpose of the *Act* is to facilitate the quick, efficient and inexpensive adjudication of complaints. It has been stated that the reconsideration power should be used sparingly and only in exceptional cases. (See *World Project Management Inc. BC EST # D134/97*; *Re: Allard BC EST # D265/97*).

The criteria for exercising the discretion to reconsider a decision was stated in *Re Milan Holdings Ltd.*, BC EST #D313/98. In *Milan Holdings*, the Tribunal set out a two-stage process for analyzing requests for reconsideration. The first stage is to decide whether the matter raised in the application for reconsideration warrants a second examination. In deciding this question, the Tribunal considers whether the focus of the request for reconsideration is to have a second panel effectively re-examine the evidence presented to the adjudicator in the first decision. The primary factor weighing in favour of a reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to merit reconsideration. Reconsideration will not be used to allow a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply disagrees with the original decision. (See *Wicklow Properties Ltd., et al.*, BC EST #D518/99)

Coast Spas and the Director have not made specific submissions for this reconsideration pointing to the fact that they have already argued the law and the facts raised by Hirschfelder during the investigation and the appeal to the Tribunal.

Hirschfelder does not accept the view of the employment agreement as presented by Coast Spas and accepted by the Director and the Tribunal. There is no doubt that Hirschfelder was a diligent employee who did not feel he could leave his duties during the 8 hours of his shift. He consistently took his meal break as breakfast at the end of his 8 1/2 hours at work. No one disputes Hirschfelder's representation of what happened each Monday to Thursday.

The issue in dispute is whether Hirschfelder was required to stay at work after 4 hours on duty, during the prescribed 1/2 hour allocated for the meal break in the Employee Handbook. Hirschfelder did not feel he could leave his security duties because the plant was closed and there was no one to relieve him. Coast Spas position was that Hirschfelder was expected to take a break and go wherever he wished. The Director found that Hirschfelder did stay at work based on his own sense of responsibility and work ethic but that he was not required to do so.

The Director concluded that there was no evidence that Coast Spas had asked Hirschfelder to work during his meal break period and was therefore Coast Spas was not responsible to pay any overtime resulting from Hirschfelder's decision to work.

Hirschfelder's appeal reargued his view of the facts, which he had presented to the Director's Delegate and were considered in the Determination. Hirschfelder had signed a letter acknowledging his knowledge of his paid work hours. The hours worked are not disputed. The sole issue is whether the hours worked resulted in overtime. The Director and the Tribunal agreed that there was no liability for overtime.

In this Application for Reconsideration Hirschfelder states that the Tribunal ignored the pay stubs that showed he did not take a meal break until the end of his shift. No one disputed that these were the facts during the hearing or on this appeal. The Tribunal decision did not specifically mention the pay stubs and the cafeteria charges, however, the Tribunal decision concluded that when Hirschfelder took his meal break was not relevant. The relevant fact was that Hirschfelder was directed to take his meal break during his shift and chose not to do so. The Tribunal determined that Hirschfelder was entitled to a half hour break and that if Hirschfelder failed to take it, it was not because his employer did not wish him to take the break. The issue for the Tribunal was whether the Director had erred in finding that Hirschfelder's employer did not expect him to work during his meal break.

Hirschfelder argued that the Tribunal and the Director favoured Coast Spas in the interpretation of the letter from Coast Spas indicating that another employee was paid for all the hours he was at work. In the

letter Coast Spas stated the other employee was paid for two shifts a week on weekends of 10 hours each. Hirschfelder was given an Employee Handbook as part of his orientation. He has not disputed this fact. The Handbook prescribes that the workday is an 8 1/2 hour shift broken up as described elsewhere in this decision. The other employee was not hired to work an 8 1/2 hour day but two 10 hour shifts. The pay arrangement for this longer shift was different and not relevant to whether Hirschfelder work day had a 1/2 hours unpaid meal break after 4 hours of work.

The Director was not represented at the Tribunal hearing on December 23, 2002. The Adjudicator heard the evidence from Coast Spas and Hirschfelder and came to the conclusion that there was no error in the Determination that warranted that it be cancelled or varied. The Adjudicator found that Hirschfelder had a mistaken belief that he could not take a proper lunch break and that Coast Spas had done nothing to support that mistaken belief.

The Adjudicator added that even if he had been wrong in his analysis that when Hirschfelder had his meal at the end of the shift, he was not working for the employer and therefore was not entitled to be paid for this time. It is unnecessary to address this issue in the situation at hand because the findings from the evidence before the Director's Delegate and the Adjudicator lead to the same conclusion.

Applying the criteria for a reconsideration set out earlier in this decision, I can find no basis in the submissions before me to reconsider the Tribunal's decision. The Adjudicator held a hearing at which both parties gave evidence and there is no suggestion of a failure by the adjudicator to comply with principles of natural justice. The facts were not disputed in a substantial manner that would result in a conclusion of a mistake of fact was made. The Appeal does not raise new evidence. I find no mistake of law in the Tribunal decision. The Tribunal did not fail to deal with relevant facts or significant issues.

CONCLUSION

Based on the evidence and written material before me there is no basis for a reconsideration and I confirm the Tribunal decision dated January 21, 2003 which confirmed the Determination.

ORDER

Having considered the decision of the adjudicator in this matter, I am not persuaded that his decision to confirm the Determination was incorrect. The application to reconsider the decision of the Tribunal is refused.

April Katz
Adjudicator
Employment Standards Tribunal