An Application for Reconsideration

- by -

Dejavu International School of Cosmetology Inc., also known as: Déjà vu International Hair Studio Inc., Déjà Vu International School of Cosmetology Inc., Dejavu International School of Hairdressing & Esthetics, Dejavu International School of Cosmetology Inc.; Dejavu International Hair & Beauty Studio; Dejavu International Hair Studio Inc.; Dejavu International Hair Studio; Dejavu International Inc.; and Dejavu International

(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2001/338

DATE OF DECISION: July 11, 2001

DECISION

OVERVIEW

This is a request for reconsideration based on written submissions pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*). On October 10, 2000 a Delegate of the Director of Employment Standards issued a Determination which found that Dejavu International School of Cosmetology Inc., also known as: Déjà vu International Hair Studio Inc., Déjà vu International School of Cosmetology Inc., Dejavu International School of Hairdressing & Esthetics, Dejavu International School of Cosmetology Inc.; Dejavu International Hair & Beauty Studio; Dejavu International Hair Studio Inc.; Dejavu International Hair Studio; Dejavu International Inc.; and Dejavu International (the "Appellant") had contravened the *Act*. The thirty-two page Determination referred to seventeen attachments, most of which were multi paged. The Determination concluded that the Appellant had violated the *Act* in regard to the employment of its former Employee, Emebet Asrat Belay (the "Respondent") between August 1996 and June 1998.

Specifically, the Director's Delegate found that the Appellant failed to meet the following portions of the *Act*:

> Section 18 (2) (Payment of all wages owing within 6 days of quit date);
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> Section 19 (Payment to the Director of wages owed to an employee who cannot be found);
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> Section 27 (Wage statements - dealt with in a separate Determination);
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> Section 44 (Entitlement to statutory holiday pay);
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> Section 46 (1) and (2) (Payment and time off requirements for employees required to work on statutory holidays);
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> Section 58 (1) (Vacation pay requirements).

The Determination ordered the Appellant to pay the Respondent $2,541.07, composed of $2,198.35 in wages and $342.72 in interest. The Director's Delegate found that there was insufficient corroborating evidence to support the Respondent's complaint concerning alleged failure to pay wages owing within 8 days at the end of the pay period, failure to pay overtime wages, or failure to pay compensation for length of service.

The Appellant appealed that Decision pursuant to section 112 of the *Act*. That appeal was made on written submissions and a Decision rendered by this Tribunal on April 18, 2001,

BC EST # D178/01. In a 10 page written Decision the Adjudicator in that appeal confirmed the Determination which had been issued on October 10, 2000 and dismissed the appeal.

ISSUE

1. Are matters raised in the request for reconsideration which in fact warrant reconsideration?

2. If reconsideration is warranted, was the Decision "on the merits" correct?

ARGUMENT

The Appellant's Position

In a three page letter dated and received by the Employment Standards Tribunal on April 27, 2001 (the last line of the first and second page of the photocopy submitted being illegible) the Appellant summarizes the request to overturn the Decision stating that the Respondent and the Appellant's neighbors all know that the Appellant does not open on holidays, that staff arrange their own schedules, and the schedule that the Respondent produced did not reflect her actual time.

The Director's Position

In a letter dated May 11, 2201 (sic) the Director's Delegate says that "there is nothing in (the Appellant's) request that was not dealt with in great detail both in the Determination and by the Adjudicator in her written Decision." The Delegate goes on to submit, "it appears that (the Appellant) simply does not like the Decision that was rendered by the Adjudicator. It is submitted that this is not sufficient reason for the Tribunal to grant a reconsideration. Therefore it is the position of the Director that the request for reconsideration ought not be granted."

The Respondent's Position

The Respondent did not file a submission on the request for reconsideration.

THE FACTS

The Appellant operates a hairdressing and cosmetology school, as well as a hair salon, at a single address on Commercial Drive in Vancouver. Several factual disputes between the parties existed concerning the dates of the Respondent's association with the Appellant's school and salon, but it was agreed that the Respondent was a student at the Appellant's school in 1995 and not an employee while a student. It was further agreed that the Respondent began employment with the Appellant's salon at some point in 1996. The

Director's Delegate found, based upon payroll records, that the Respondent began employment with the Appellant on June 1, 1996. The Respondent was then injured in a car accident on October 13, 1997 and told the Director's Delegate that she ceased working for the Appellant after going into work on October 14, 1997 as she was unable to carry on work due to pain. The Respondent returned to work on June 9, 1998. Thus, there was a lengthy hiatus in the Respondent's attendance at the workplace. The Respondent took the position that she was on sick leave while the Appellant took the position that there was a break in service. During this hiatus in employment there was a continued notation in the payroll records for the Respondent of "accident" which the Adjudicator in the initial appeal of the Delegate's Determination found implied some ongoing scheduling expectation.

It is apparent that the Appellant made extensive submissions to the Director's Delegate both in person and in writing submitting substantial written material in support of her submissions. Indeed, the Delegate's summary of the Appellant's position and submissions at the investigation stage comprise approximately six pages of the Determination. The Appellant made further extensive submissions on the initial appeal before this Tribunal in an appeal form dated October 30, 2000 and supplemental letter with written submissions dated October 31, 2000 (five pages in length) along with further documentary evidence.

ANALYSIS

Section 116 of the *Act* contains the statutory authority for the Employment Standards Tribunal to reconsider its own decisions. The Section reads:

> ***Reconsideration of orders and decisions***
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> *116. (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) cancel or vary the order or decision or refer the matter back to the original panel.*
>
> *(2)The director or a person named in a decision or order of the tribunal may make an application under this section.*
>
> *(3)An application may be made only once with respect to the same order or decision.*

In the case of *Canadian Chopstick Manufacturing Co. Ltd.* BC EST #D448/00 this Tribunal said the following at page 12:

The power to reconsider its decisions is a discretionary power which the Tribunal uses sparingly. Section 116 is not an avenue for parties to rehash evidence or repeat arguments that were made before an original panel.

The leading case on the use of the discretionary power in Section 116 is *Zoltan Kiss* (BC EST #D122/96; Reconsideration of BC EST #D091/96).

In *Zoltan Kiss* the Tribunal set out some typical grounds that the Tribunal may use as a guide to reconsider an order or decision. Those grounds were stated as (1) a failure by the Adjudicator to comply with the principles of natural justice; (2) there is a mistake in stating the facts; (3) a failure to be consistent with other decisions which are not distinguishable on the facts; (4) some significant and serious new evidence has become available that would have lead the Adjudicator to a different decision; (5) some serious mistake in applying the law; (6) some misunderstandings of a failure to deal with a significant issue in the appeal; and finally (7) some clerical error exists in the decision. That list is not viewed as exhaustive of the possible grounds for reconsidering a decision or order.

The Tribunal went on to set out important reasons why its statutory power to reconsider orders and decision should be exercised with great caution. Some of those reasons are:

> Section 2(d) of the Act established one of the purposes of the Act as providing fair and efficient procedures for resolving disputes over the application and interpretation of the Act. Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.
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> Section 115 of the Act establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or cancelling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reason.
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> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

> In his report, Rights & Responsibilities in a Changing Workplace, Professor Mark Thompson offers the following observation at pate 134 as one reason for recommending the establishment of Tribunal:
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> > The advice the commission received from members of the community familiar with appeals system, the staff of the Minister and the Attorney General was almost unanimous. An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible costs to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards.
>
> Professor Thompson also noted that the appeal process should not be protracted because many claimants (employees) "….need the monies in dispute quickly to meet their basic needs." (See *Zoltan Kiss, supra)*

In re: *Allard* [1997] BC EST #D265/97 the Tribunal stated:

> "It is the policy of the Tribunal that the power to reconsider orders and decisions under Section 116 is a power that should be exercised with caution and should only succeed where there has been a demonstrable breach of the rules of natural justice, or a fundamental error in law or where compelling new evidence is available. This policy has been established in order to provide a fair and efficient process where one hearing will provide a means of final and conclusive resolution of a dispute. The purpose is to allow cases to be resolved quickly, efficiently and inexpensively and it is contrary to the spirit and intent of the Act to allow a rehearing where a submission is based on a re-hash of evidence and argument before the original panel. Indeed it has been stated that reconsideration should be used sparingly and only in exceptional cases. (See *World Project Management Inc. et al* BC EST #D134/97)"

In another Decision of this Tribunal, *Milan Holdings Ltd.*, BC EST #D313/98, this Tribunal set out a two stage analysis in the reconsideration process. In the first stage, the issue is whether the matters raised in the application for reconsideration do in fact warrant reconsideration. In deciding this question, the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter (to avoid multiple decisions), and whether its primary focus is to have reconsideration effectively "reweigh" evidence tendered before the Adjudicator. In *Milan*, the following was said:

> Paragraph 15. 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……"
>
> Paragraph 16. After weighing these and other factors relevant to the matter before it, the panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the Adjudicator's Decision. Should the panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the Decision being reconsidered.
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> Paragraph 17. The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such a review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness……This approach is also consistent with the expectation of the courts on judicial review which will be reviewing decisions of reconsideration panels on questions of law within jurisdiction based on the "patently unreasonable" test; *Canada (Attorney General) vs. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.).

In reviewing the Appellant's written request dated April 27, 2001 I cannot find that the Appellant has met the onus on it to demonstrate an error in the Decision appealed from based on any of the grounds enumerated in the leading case *Zoltan Kiss*. In the request for reconsideration dated April 27, 2001 (the "Request") the Appellant says "re: Issues, based on evidence; which was sent into the Tribunal which clearly states that …..". It is apparent from this initial statement that the Determination and Decision on appeal of that Determination were based on the evidence submitted.

The Appellant goes on in the request to refer to a number of specific issues. For example, the Appellant notes that the Respondent started working part time in 1996 while she worked part time for another company in 1996 to 1997. In addition, the Appellant says the ROE marked the end of the Respondent's employment. These matters were, however, dealt with in the Decision at pages 4 to 6 under the heading "Belay's dates of employment". The Appellant does not demonstrate any error in this regard.

The Appellant also submits in the request that "I never opened on statutory holidays" and "payroll records showed hours paid for those holidays. It does not mean that the person worked but they were paid." The Adjudicator referred in her Decision to letters the

Appellant filed suggesting it did not operate on statutory holidays saying at page 8 under the heading "Belay's wages owed, statutory holidays" that letters offered on the appeal were new evidence which were not provided at the investigation stage, with no explanation for failure to do so, such that they were not considered. In regards to the payroll records, the Adjudicator said at page 9 that "Dejavu offers nothing to convince me that the Director's Delegate was in error in using Dejavu's records and schedules." It is clear that the Adjudicator did refer to these records and no error has been shown in this regard.

The Appellant further submitted in the request that they had not heard from the Respondent until April 1998, that the Appellant did make issue of the break in service, and requested that the EI (UI) report be referred to as she called the employment insurance office to inform them of the falsehood of the Respondent's claim. The Adjudicator noted at page 10 of her Decision that "the Director's Delegate preferred Belay's evidence to that of Dejavu" and found that nothing was offered or shown on appeal to convince her that this was an error. Similarly, on this request for reconsideration, nothing is offered or shown to indicate that an error was made by the Delegate or the Adjudicator.

Accordingly, I do not find that the Appellant's request warrants a reconsideration as it appears to merely request a reweighing of the evidence which was tendered before the Delegate and further considered on appeal. I do not find any other compelling reasons exist to warrant a reconsideration.

In the circumstances, I do not find it necessary to go on to consider the second issue or stage of the reconsideration analysis process to determine whether the decision was correct on the merits.

ORDER

The original Decision dated April 18, 2001 and cited as BC EST #D178/01 is confirmed with interest to be calculated to date.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal