

BC EST #D474/99
Reconsideration of BC EST #D108/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of
the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

429485 B.C. Limited Operating as
Amelia Street Bistro
("Amelia Street Bistro")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Richard S. Longpre

FILE NO.: 1999/499

DATE OF DECISION: October 25, 1999

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DECISION

Written Submission

Mr. Bruce Matheson	on behalf of the Amelia Street Bistro
Gerry Olmstead	on behalf of the Director

OVERVIEW

Pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), Amelia Street Bistro requests reconsideration of a decision by the Employment Standards Tribunal, BC EST #D108/98, dated April 16, 1998. In that decision, the Tribunal found that the complainant, Walter Teleman, was an employee, not a manager, as defined by the *Act*. The Tribunal also found that Amelia Street Bistro owed Teleman \$6,645.49 for overtime hours worked, vacation pay on those hours and interest.

Amelia Street Bistro argues that it was never given an opportunity to present evidence disputing the overtime hours Teleman was found to have worked.

ISSUE TO BE DECIDED

Should this panel return the matter to the original panel or to the delegate to hear the evidence Amelia Street Bistro says it was never given the opportunity to present.

FACTS

This case has a lengthy history. In a Determination, dated December 3, 1996, the delegate of the Director of Employment Standards concluded that Teleman was an employee under the *Act* and was owed \$6,645.49 for overtime hours worked and vacation pay for those wages. Amelia Street Bistro appealed that Determination on the grounds that Teleman was a manager and not an employee covered by the *Act*. In BC EST #D170/97, dated April 29, 1997, the original panel agreed with Amelia Street Bistro and the Determination was cancelled.

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The Director sought reconsideration of the original panel's decision. The Director argued that the original panel erred in concluding that Teleman was a manger. In BC EST #D479/97, the Tribunal's reconsideration panel concluded that the original panel had erred in her analysis in deciding whether Teleman was an employee or a manager under the *Act*. They referred the matter back to the original panel on the following terms:

The original panel should be guided by the analysis we have set out and should consider such matters as whether the majority of the call on Teleman's time was related to supervising and directing employees, whether he had exercised any of the power and authority typical of a manager, that is, did he in fact have final judgement and discretion in respect of those matters listed above and, if so, to what degree, and whether the primary reason for his employment was to supervise and direct other employees or, as suggested by the decision, to perform the duties of a chef. (p.7)

On April 16, 1998, the original panel issued her decision and addressed the above analysis in BC EST #D108/98. Teleman was found to be an employee under the *Act*. The decision also referred to the compensation owed to Teleman only in her conclusion:

Pursuant to Section 115 of the *Act*, I order that the Original Decision BC EST No. D170/97 to be varied and the Determination in this matter, dated December 3, 1996 be confirmed in the amount of \$6,645.49....(p.7)

On March 3, 1999, Amelia Street Bistro wrote to the Tribunal asking that "this file be reopened immediately." Two points were raised. First, Amelia Street Bistro argued that the original panel had not considered all of the evidence in deciding whether Teleman was an employee or a manager. Second, Amelia Street Bistro argued that in deciding on the number of hours Teleman worked, the delegate looked "simply at the hours on the door of the restaurant..." Amelia Street Bistro argued the evidence would show Teleman's hours of work were not tied to the restaurant's hours of business.

On July 19, 1999, Amelia Street Bistro requested reconsideration of BC EST #D108/98 in a very brief letter to the Tribunal. On July 21, 1999, the Tribunal requested Amelia Street Bistro to provide more details. On July 30, 1999, Amelia Street Bistro filed a longer submission. Bruce Matheson, on Amelia Street Bistro's behalf, argued that he was never given the opportunity to give evidence on the hours Teleman actually worked. He submitted that Teleman had "total control" over his job functions and his attendance at the restaurant. He also argued that he had requested Teleman to record his hours worked and that Teleman "indignantly refused". Matheson briefly reviewed the evidence he would call to show that Teleman did not work the overtime hours he claimed to have worked.

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On August 13, 1999, the Tribunal notified Teleman and the Director of Amelia Street Bistro's reconsideration application and requested submissions by September 3, 1999. The delegate replied and Teleman did not. The delegate reviewed the unsuccessful attempts made between April 27, 1998 and February 4, 1999 to collect the monies owed by Amelia Street Bistro. After February 1999, bailiff services tried unsuccessfully to collect the full amount owed.

On September 8 1999, Amelia Street Bistro was sent the delegate's submission. A reply submission was requested by September 22. Amelia Street Bistro did not reply.

ANALYSIS

Amelia Street Bistro wrote to the Tribunal on March 3, 1999. It did not file a formal reconsideration application until July 19, 1999. On July 30, 1999, it set out the basis for the reconsideration of the Tribunal's April 16, 1998 decision. Specifically, the Tribunal's decision to reinstate the December 3, 1996 Determination and ordered Amelia Street Bistro to pay Teleman \$6,645.49.

In *The Director of Employment Standards* BC EST #D122/98 (Reconsideration of BC EST #D172/97), the Tribunal set out the basis on which an application for reconsideration would be considered:

An application for reconsideration should succeed only where there has been a demonstrable breach of principles of natural justice, where there is compelling new evidence not available to the original panel, or where the adjudicator has made fundamental error of law. (p.5)

The Tribunal's reconsideration panel also dealt with the time frame in which an application for reconsideration must be made. Noting that the *Act* does not impose a specific time limit, the reconsideration panel states:

In our view, an application for reconsideration must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each particular case. The Tribunal may be guided by the principles applied by the courts and the length of the delay may not be determinative. However, as noted by the courts, if good cause can be shown for a long delay, the Tribunal will exercise its discretion to reconsider. (p.7)

Amelia Street Bistro may not be responsible for the delay prior to the issuance of the original panel's decision in April 1998. Amelia Street Bistro, however, is responsible for the delay in pursuing a reconsideration of the original panel between April 1998 and July 1999.

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Amelia Street Bistro's application for reconsideration was made fourteen months after the decision was rendered. As the delegate's submission states, Employment Standards attempted to enforce the April 1998 decision over nine months. Throughout this time, Amelia Street Bistro did not seek reconsideration of the Tribunal's decision. Further, having appealed the December 3, 1996 Determination, Amelia Street Bistro was aware of its right to appeal the April 16 1998 decision. In March 1999, Amelia Street Bistro raised its concerns with the Tribunal; however, it waited until July 1999 to file its reconsideration application. The appeal submission of Amelia Street Bistro provided no explanation for the long delay.

There is no evidence that prior to March 1999, the Tribunal was aware that Amelia Street Bistro intended to request reconsideration of the original panel's decision. Amelia Street Bistro's reconsideration disputes the hours Telemann worked during 1995 and 1996. Neither Amelia Street Bistro nor Telemann kept a record of the days and the hours Telemann worked. Memories have no doubt faded since that period of time. It would be unduly prejudicial for Telemann to have to respond to the Amelia Street Bistro's case at this time.

The delay in filing the reconsideration and the prejudice Telemann would face in responding to the appeal outweigh the evidence Amelia Street Bistro argues demonstrates a *prima facie* case. In light of the above, it would be unreasonable to proceed with the application for reconsideration at this time.

ORDER

Pursuant to Section 116 of the *Employment Standards Act*, the Tribunal's decision, BC EST #D108/98, is confirmed. Amelia Street Bistro is directed to compensate Walter Telemann \$6,645.49, plus accrued interest.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal