

An Application for Reconsideration

- by -

W E P Holdings Ltd. operating as Robins Donuts  
(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

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2001/531

**DATE OF DECISION:** September 13, 2001

## DECISION

### OVERVIEW

This is an application filed by W E P Holdings Ltd. operating as “Robins Donuts” (the “Employer”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision issued on July 12th, 2001 (B.C.E.S.T. Decision No. D377/01). Following an oral hearing, the adjudicator confirmed a Determination issued by a delegate of the Director of Employment Standards on January 30th, 2001 pursuant to which the Employer was ordered to pay its former employee, Kevin Taylor, \$1,740.71 on account of unpaid regular wages, overtime pay, statutory holiday pay, vacation pay and interest.

### THE REQUEST FOR RECONSIDERATION

The Employer’s request for reconsideration is contained in a letter to the Tribunal dated July 18th, and filed July 19th, 2001. In essence, Mr. Jian Gu, on behalf of the Employer, challenges two components of the wage award confirmed by way of the adjudicator’s decision, namely, statutory holiday pay for April 21, 2000 and regular wages for March 24th and 25th, 2000.

In addition, in his July 18th letter Mr. Gu says that he was not as fully prepared as he ought to have been when he appeared before the adjudicator and thus “missed [his] chance” to convince the adjudicator that the Determination was incorrect. Mr. Gu says that if there is a new appeal hearing, he will call a witness who did not testify before the adjudicator. I might parenthetically note that there is nothing in the material before me to suggest that this particular witness was unavailable on the day of the appeal hearing; it would appear that the Employer simply decided to proceed with its appeal without this individual’s testimony. Furthermore, the reconsideration provision of the *Act* was never intended to permit a party to “rehabilitate” their case by presenting evidence and arguments that it neglected to put before the Tribunal at the appeal hearing.

In a subsequent submission to the Tribunal, dated July 24th, and filed July 26th, 2001, Mr. Gu raised four other issues, namely, Mr. Taylor’s entitlement to overtime pay, Mr. Taylor’s right to be paid wages while being trained by the Employer, the Employer’s right of “setoff” for the cost of food consumed by Taylor and/or his associates and other “loans” and, finally, that the Director’s delegate was biased.

## ANALYSIS

Several of the grounds advanced in support of the application for reconsideration are being raised before the Tribunal for the first time. As noted in the adjudicator's decision (at page 3): "...the Employer indicated that it had two concerns with the Determination: (1) pay for the training time; and (2) the overtime awarded".

Since the various issues raised in the reconsideration application, other than the overtime and training pay matters, were not raised at the appeal hearing, I am of the view that it is not appropriate--on an application for *reconsideration*--to address issues that were not argued before the adjudicator. Further, and in any event, even if these other issues are properly before me, there is nothing in the material that would compel me to conclude that any of these issues is meritorious. Indeed, several of these new arguments could be fairly characterized as frivolous.

I shall now address the two issues that are properly before me, namely, training pay and overtime pay.

### ***Training pay***

The Employer's argument on this point is essentially identical to that made before the adjudicator. First, Mr. Taylor agreed to train as a baker without pay and, second, that the hours claimed during his "training period" were inflated. The Employer's argument was fully addressed by the adjudicator (at pages 3-4 of his decision) and I am in complete agreement with his findings. Even if Mr. Taylor did sign some sort of agreement (which, I note, has never been produced), such an agreement is void by reason of section 4 of the *Act* which prohibits attempts to "contract out" of the *Act*.

### ***Overtime pay***

The amount of overtime hours actually worked by Mr. Taylor was in dispute before the adjudicator and, so far as I can gather, the adjudicator carefully reviewed the conflicting evidence and made certain findings of fact. Given that these findings were supported by a proper evidentiary foundation, the adjudicator's findings of fact are not reviewable by way of an application for reconsideration. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

**ORDER**

The application to vary or cancel the decision of the adjudicator in this matter is **refused**.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**