

BC EST #D579/97
Reconsideration of BC EST #D410/97

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 -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/801

DATE OF DECISION: February 11, 1998

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DECISION

OVERVIEW

This is a reconsideration under Section 116 of the *Employment Standards Act* of Decision BC EST #D410/97 which was issued by the Employment Standards Tribunal on September 5, 1977. That Decision varied a Determination issued by the Director of Employment Standards on June 9, 1997.

Atwal has applied for a reconsideration of the Tribunal's decision, arguing that #D410/97 it "ignores those points that were presented against the stand taken by the employer". The Director also seeks reconsideration:

The Director submits that the adjudicator made an error in law when, in the Director's view, he found wages owed based on assumption and conjecture. Speculation as to the probable amount of wages owed, the Director submits, must be based on objective evidence. Absent such evidence, a claim for wages owed must be dismissed as being unproved.

ISSUE TO BE DECIDED

The issue is whether there are grounds to reconsider #D410/97.

FACTS

Atwal was employed at a small restaurant operated by Lahore Sweets & Restaurant Ltd. ("Lahore Sweets"). She filed a complaint with the Employment Standards Branch claiming unpaid wages. The Director's delegate investigated and concluded that the Lahore Sweets had wrongly withheld part of Atwal's final wages to pay for damages caused by the employee; that sum was ordered to be repaid. The Determination also used evidence submitted by Atwal, a statement of days she worked and the number of hours worked each day, to conclude that she was owed regular wages, overtime and vacation pay. The Determination also pointed out several problems with the employer's record-keeping but that is not relevant to the issue before me and need not be discussed here.

Atwal appealed the Determination, on the grounds that it had failed to take into account all of the hours she actually worked. Following an oral hearing, at which both the employee and employer admitted evidence and called witnesses, the adjudicator reduced the sum of wages payable under the Determination. The basis of the decision was set out this way:

This appeal, in the absence of any credible records from either party, must be resolved on the basis of the parties' relative credibility. This approach, too, is problematic in that I find both Atwal's and the Chaudry's evidence [on behalf of Lahore Sweets] to be unsatisfactory. As previously noted, there are no credible contemporaneous payroll records upon which I can base a reasoned conclusion. Finally none of the witnesses stands independent from the two parties.

I do not believe that Atwal was regularly working as late as she testified; on the other hand, I do believe that she worked somewhat longer hours than acknowledged by the employer. Having considered the evidence in its totality, I am of the view that, on the balance of probabilities, Atwal worked 8 hours per day, 6 days per week, during the period of her employment.

Thus, BC EST #D410/97 reduced the sum owing to Atwal under the Determination.

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ANALYSIS

The Tribunal is empowered to hear reconsideration applications by section 116 of the *Act*:

- 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.

This power is not an unlimited opportunity to revisit the original decision. This Tribunal has repeatedly said that an order for reconsideration should lie in limited circumstances and in *Zoltan Kiss BC EST #D122/96* outlined some typical situations:

- a failure by the Adjudicator to comply with the rules of natural justice;
- there is some mistake in stating the facts;
- some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

Here, the applicant maintains that the adjudicator failed to give proper weight to some of the evidence in her favor. She submitted that the employer failed to pay her regularly and wrongly deducted "time at the beginning of work and at the end of work"; that employees were required to report for work one hour prior to opening; that peak business hours were between 6 p.m. and midnight and that employees would often have to work late; that the employer did not have proper payroll records; and that she worked for the firm and is experiencing hardship because of the delay in these proceedings. The essence of her argument is that the adjudicator failed to properly consider the evidence, and this Tribunal has repeatedly stated that an application for reconsideration will not succeed where it is based on a request to reweigh the evidence. (*Bicchierie Enterprises Ltd. BC EST #D335/96*)

Similarly, the arguments made by the Director do not establish grounds for reconsideration. It is argued that the adjudicator based the Decision on "conjecture" and where there is no objective evidence, the appeal should be dismissed. However, I disagree with this characterization of the rationale in #D410/97. The adjudicator said he had difficulty coming to a decision because of a lack of credible witnesses or business records, but that nonetheless concluded that Atwal had worked some overtime, although less than the amount she had claimed. Accordingly, he varied the Determination. The Director argues that the proper approach would have been to dismiss Atwal's appeal and to allow the original Determination to stand. But the adjudicator concluded that the evidence did not support Determination and ordered a variance. I am not convinced that this approach constitutes an error of law.

ORDER

Pursuant to section 116 of the *Act*, I decline to vary or cancel the Tribunal Decision BC EST #D410/97.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal