

An Application for Reconsideration

- by -

T.S.L. Enterprises operating as Michael's Restaurant
("Director" or "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: Paul E. Love

FILE No.: 2001/711

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by T.S.L. Enterprises Ltd., operating as Michael's Restaurant ("TSL" or "Employer") made pursuant to s. 116 of the *Employment Standards Act, R.S.B.C. 1996, c. 113*, of a decision of the Employment Standards Tribunal ("Tribunal") dated August 21, 2001 (the "original decision"). A Delegate of the Director of Employment Standards ("Delegate") issued a Determination, dated April 14, 2001 , in favour of three employees. The issue before the Adjudicator was whether the Employer had provided and paid for a meal break for the Employees. The Adjudicator confirmed the Determination, after an oral hearing. Both the Adjudicator and the Delegate relied on time cards for ascertaining the time spent by the employees at work, and the shift start and end times. The reconsideration application was related to errors alleged to have been made in the shift times. The Employer provided a "statutory declaration" of three employees, which purported to set out shift start times different from those on the time cards. No explanation was provided by the Employer how "different" start times, would effect the Determination. The Employer did not provide any explanation why this evidence was not provided to the Original Adjudicator. I determined that this was not an appropriate case for reconsideration, as the Employer was asking me to "re-weigh" evidence before the Adjudicator in combination with new evidence, all without identifying how the "error" would effect the outcome of the appeal. I therefore dismissed the application for reconsideration.

ISSUES TO BE DECIDED

Has the appellant raised an issue meeting the threshold for reconsideration?

If this is a proper case for reconsideration, did the Adjudicator err with regard to the hours worked by the Employees?

FACTS

This reconsideration application is decided upon written submissions of T.S.L. Enterprises Ltd. operating as Michael's Restaurant ("Michael's"), the Delegate, Ms. Duncan and Kristen Garland. after an oral hearing by an Adjudicator. T.S.L. operated a restaurant and a convenience store adjacent to the restaurant. In the Determination, the Delegate found that three employees, Gail Duncan, Kristen Garland, and Leleah Schaufert, were entitled to the wages in the amount of \$670.46, \$2,927.55, and \$422.13 , respectively, plus interest.

The Adjudicator stated:

"The sole issue before me is whether the Employees should or should not be paid for lunch breaks as set out in the Determination"

...

It is suggested that the Employees did not work as shown by their time cards but less than that. I am shown, however, that the Employer itself relied on those time cards. That is the bonus on which they were paid. I am satisfied that the Determination should reflect the time cards in the absence of any evidence that a better record is available.

The Adjudicator found that the employees were sometimes not given a meal break and were required by the Employer to work their meal break. The meal break requirement is set out in s. 32(10 and (2) of the *Act*.

32 (1) An Employer must ensure

(a) that no employee works more than 5 consecutive hours without a meal break, and

(b) that each meal break lasts at least a ½ hour

(2) An Employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee

The issue raised by the Employer, in the request for reconsideration received by the Tribunal on September 27, 2001 is “The time cards prepared and completed by Gail Duncan, Kristin Tonks, formerly known as Kristin Garland.” The employer elaborated on the grounds for appeal in a letter dated October 4, 2001:

Our letter for appeal had been sent to this office without the official application of reconsideration. Please include in our application the sworn testimonies of the three security staff. We are requesting a reconsideration in regards to the actual hours the Employees were on the premises. Time cards filled in 6:30 - 2:30- and 2:30 to 10:30 are incorrect. If additional monies are owed it should be only on the actual time an employee was present on the worksite.

The Employer has filed with its appeal submission, a document which is purported to be a statutory declaration from three employees, who “opened the business” at a time different than what was set out in the time cards. While it is in the form of a statutory declaration it is not sworn before a notary public or commissioner. On one copy of the “statutory declaration” the signatures of the deponents are in quotes, and the signatures are not witnessed. On the signed copy of the “statutory declaration” the person taking the name of the notary public has been crossed out and replaced with the name of Debbie Schiller, a principal of the employer. The document purports to establish an error with regard to time cards, in particular that the employees started at a time different from that set out in the time cards. No reason is advanced why this document could not have been introduced at the original hearing.

The employees, and the Delegate take the view that this is not an appropriate case for reconsideration as the appellant's primary focus is to re-weigh evidence considered by the Adjudicator. Ms. Duncan notes that even if the Employer's submission was correct that she still would have worked 7 3/4 hours per shift, without a meal break. The Delegate further submits that there is no question of law, fact, principle or procedure which is so significant that the matter should be reviewed because of importance to the parties or because of an important implication for future cases.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the Employer, to show that this is a proper case for reconsideration, and that the adjudicator erred such that I should vary, cancel or affirm the Decision. An application for reconsideration of a Tribunal's decision involves a two stage analysis, as set out in *Milan Holdings Ltd.*, BCEST #D313/98:

...At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST #D522/97 (Reconsideration of BCEST #D007/97).
- (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);
- (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or

interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "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 reasons": *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96).

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.

The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

- a) a failure by the adjudicator to comply with the principles of natural justice;
- b) a mistake of fact;
- c) inconsistency with other decisions which cannot be distinguished;

- d) significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;
- e) misunderstanding or failing to deal with an issue;
- f) clerical error.

I turn now, to this application for reconsideration advanced by the Employer. The Employer seeks to overturn a finding of fact made by the Delegate, and also made by the Adjudicator. The Adjudicator heard this argument, and heard from the witnesses. The Employer seeks that I reweigh the evidence, and consider new evidence. The Employer has not explained why the new evidence could not have been provided to the original Adjudicator. It is unclear to me from the Employer's submission, what effect, if any, the Employer's argument, if successful, would have on the Adjudicator's decision. The "correctness of the start time" has no apparent connection to the original issue raised by the employer on the appeal, which is liability for meal breaks. Reconsideration is not meant to be forum where parties raise new issues, or provide new evidence on a matter, which was not argued, but perhaps could have been argued on the appeal. This reconsideration application does not fall within the grounds for a reconsideration, as defined in the Tribunal's jurisprudence. I therefore decline to consider the merits of this application and dismiss the application as one not falling within the proper scope for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I confirm the Decision dated August 21, 2001.

Paul E. Love
Adjudicator
Employment Standards Tribunal