

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration  
pursuant to section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

- by -

Siu Yin Yau  
("Ms. Yau")

- of a Decision issued by -

The Employment Standards Tribunal

**PANEL:** Shafik Bhalloo

**FILE NO.:** 2023/031

**DATE OF DECISION:** June 26, 2023

## DECISION

### SUBMISSIONS

Siu Yin Yau

on her own behalf

### OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the “ESA”), Siu Yin Yau (“Ms. Yau”) seeks reconsideration of a decision of the Tribunal issued on February 23, 2023 (the “original decision”).
2. The original decision considered an appeal of a determination issued by Kara L. Crawford (the “adjudicating delegate”) of the Director of Employment Standards (the “Director”), on August 11, 2022 (the “Determination”).
3. The Determination was made by the Director on a complaint filed by Ms. Yau, formerly employed as an Insurance Advisor with S & S Insurance Services Ltd. (the “Employer”), that the Employer failed to pay her overtime wages and compensation for length of service (the “Complaint”). Another delegate of the Director investigated the Complaint and prepared an investigation report which the adjudicating delegate reviewed together with all the information on the file and held the Employer failed to pay Ms. Yau wages for overtime of \$5,152.45 contrary to section 37.14 of the *Employment Standards Regulation*, annual vacation pay of \$630.38 contrary to section 58 of the *ESA*, and accrued interest of \$237.83 pursuant to section 88 of the *ESA*. The adjudicating delegate also levied mandatory administrative penalties of \$1,500.00. In total, the Employer was ordered to pay \$7,520.66.
4. The Determination dismissed Ms. Yau’s claim for compensation for length of service, finding that the Employer had established just cause under the *ESA*.
5. The Determination stated the statutory deadline for filing an appeal was September 6, 2022, if served by e-mail or September 19, 2022, if served by ordinary or registered mail.
6. On September 20, 2022, Ms. Yau requested the Tribunal provide her with information on how to file an appeal after expiry of the appeal period. On the same day, the Tribunal responded and provided information to Ms. Yau on how to file an appeal and how to request an extension of the appeal period. The Tribunal gave the Ms. Yau a deadline of September 27, 2022, to provide the appeal documents.
7. The Tribunal did not receive any documents from Ms. Yau on September 27, 2022.
8. On October 4, 2022, Ms. Yau filed an Appeal Form and requested another extension of the appeal period to November 18, 2022. On the Appeal Form she stated the reason for requesting the extension was because she had recently had brain surgery.
9. The Tribunal gave Ms. Yau until November 18, 2022, to file the complete appeal. The Tribunal informed her that she had not provided supporting evidence for the requested extension and advised that no

further extensions would be allowed absent exceptional circumstances. The Tribunal also advised that the file may be closed without further notice if the Tribunal did not receive the requested documents.

10. The Tribunal did not receive any submissions from Ms. Yau by the November 18, 2022, deadline.
11. On November 21, 2022, the Tribunal wrote to the parties to advise that Ms. Yau had not provided the required information to complete the appeal and that her appeal file was closed.
12. On November 25, 2022, Ms. Yau requested a further extension to December 18, 2022. On the Appeal Form she stated: "I recently had a brain surgery & my mom has been really sick & I am the only one she has."
13. On November 28, 2022, Ms. Yau provided the Tribunal with her written reasons and argument and supporting documents. On December 6, 2022, the Tribunal contacted Ms. Yau to request she confirm whether she still required until December 18, 2022, to submit additional documents in support of the appeal. Ms. Yau did not respond or provide further submissions.
14. On December 10, 2022, the Tribunal reopened Ms. Yau's appeal file and the matter was assigned to Tribunal Member John Chesko ("Tribunal Member").
15. On the Appeal Form, Ms. Yau submitted that there is new evidence that was not available at the time of the Determination and appealed the part of the Determination dismissing her claim for compensation for length of service.
16. She submitted that the Employer's evidence is unreliable, and her evidence should be preferred. She alleged the Employer has "made up" the documentation it submitted to the Director. She also submitted the allegations in the dismissal letter were unfounded and untruthful and were made up to avoid severance payments. She also alleged she had never seen the performance reviews submitted to the Delegate and her signature on those documents were falsified.
17. Ms. Yau also said that she had to chase the Employer to receive her pay cheques and that income tax deductions were inaccurate. She also alleged there were some errors in the calculations of hours worked, including overtime hours. She claimed she regularly worked overtime.
18. Ms. Yau also submitted that the adjudicating delegate erred in accepting the evidence of the Employer and finding there was just cause. She said the Employer never complained about her work and gave her difficult and complex files, which she would not have been assigned if she was incompetent. She said her current employer can attest to her experience and competence. She also disputed some of the facts found by the adjudicating delegate and alleged that signatures were forged by the Employer. She noted that although she "should have provided a more detailed response in a more detailed manner the first time around", it was difficult for her to deny or refute allegations when she no longer worked at the company and could not access the Employer's files.
19. On February 23, 2023, the Tribunal Member dismissed Ms. Yau's appeal pursuant to section 114(1)(b) for failing to file it within the applicable time limit.

20. The Tribunal Member noted that in this case the delay in filing the appeal was not a matter of days or even weeks but stretched out over several months with repeated requests for further extensions. The Tribunal Member also pointed out that Ms. Yau's explanation for not meeting the time requirements was insufficient. She stated she had brain surgery but did not provide any supporting documentation specifying when the surgery took place or her limitations as a result of the surgery. Relatedly, the Tribunal Member noted that Ms. Yau did not explain how her mother's health condition prevented her from completing the appeal, notwithstanding the Tribunal's letter to her of October 5, 2022, specifically advising her to provide supporting evidence for the requested extension.
21. While the Tribunal Member observed that there may not be prejudice to the Employer or the Director if the extension were granted, there were overwhelming factors against granting an extension of time including: (i) Ms. Yau's late inquiry about an extension to the appeal period, (ii) her incomplete submissions; (iii) her repeated requests for extensions, (iv) her failure to adduce any evidence she made the Employer or Director aware of an intention to appeal; and (v) the absence, in her submissions, of strong *prima facie* case to appeal the Determination. With respect to the latter factor, which the Tribunal Member considered to be a very important consideration, he notes that Ms. Yau's argument in the appeal focuses on her disagreement with the Employer's evidence and the findings of fact made by the adjudicating delegate. He also adds that while Ms. Yau submits there is new evidence that was not available, she does not provide any additional information that was not available to her at the time of the investigation and before the issuance of the Determination. He states Ms. Yau's submissions are an attempt to re-argue the case. For all of these reasons, the Tribunal Member found that Ms. Yau had not met the burden to show that the statutory appeal period should be extended, and therefore dismissed the appeal pursuant to section 114(1)(b) of the *ESA*.
22. Although not required to, the Tribunal Member also went on to explain that even if he had not dismissed the appeal on the basis of untimeliness under section 114(1)(b) of the *ESA*, he would have dismissed the appeal on the merits. More particularly, he states that on the Appeal Form, Ms. Yau alleged that there was new evidence not previously available. One of the requirements to introduce new evidence on appeal is that it must not have been available at the investigation or adjudication stage. In her submission Ms. Yau acknowledges that points raised in her appeal could have been submitted 'the first time around' during the investigation. Therefore, the Tribunal Member states, the submissions do not meet the requirements for new evidence and this ground of appeal fails.
23. The Tribunal Member also observes that while Ms. Yau does not rely on the "error of law" ground of appeal, her appeal submissions appear to allege the Director erred in law in finding that there was just cause for her dismissal and dismissing her claim for compensation for length of service. The Tribunal Member then notes that the burden is on Ms. Yau to show a material legal error in the decision. He also notes that a disagreement with a finding of fact does not amount to an error of law and then goes on to give some examples of error of law delineated in the Tribunal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLii 6466. He concludes, based on his review of the Determination and the evidence in the record, that there is no error of law in the Determination. He states that the Delegate applied the correct legal test, and his findings were supported on the evidence. He adds that while Ms. Yau may not agree with the Determination, there was evidence the adjudicating delegate could rely on to make the findings of fact and arrive at the conclusion there was just cause. He also notes that while Ms. Yau alleges the documents were falsified, she could have made this argument at the first

instance, and she did not provide an explanation about why she failed to do so. In the result, the Tribunal Member states there is no error of law and this ground of appeal, too, fails and is dismissed.

24. In sum, the Tribunal Member states that there is no reasonable prospect the appeal would succeed and had he not dismissed the appeal for untimeliness, he would have dismissed it pursuant to section 114(1)(f).
25. On March 20, 2023, the Tribunal received an email from Ms. Yau which included the Reconsideration Application Form and a written request for an extension to the statutory reconsideration period to April 20, 2023. Upon review of the document, the Tribunal noticed that Ms. Yau did not indicate which decision she wished to appeal to the Tribunal to reconsider as there were two decisions the Tribunal rendered on February 23, 2023, one in connection with the appeal filed by the Employer and another filed by Ms. Yau.
26. On March 22, 2023, The Tribunal requested Ms. Yau to advise which decision she wished to be reconsidered by March 27, 2023. Ms. Yau responded on the same date and advised that her application was in connection with the original decision that was rendered by the Tribunal Member in the appeal filed by her.
27. On March 24, 2023, the Tribunal informed Ms. Yau that her written reasons and arguments and any supporting documents should be provided to the Tribunal by no later than 4:30 p.m. on April 20, 2023, and that this deadline is not an extension to the statutory reconsideration period but only a deadline to provide the requested documents to the Tribunal. The Tribunal also informed Ms. Yau that the panel assigned to decide the application will decide whether to extend the statutory reconsideration period. The Tribunal also informed Ms. Yau that if the Tribunal does not receive her submissions by the stated deadline, absent any further extensions granted by the Tribunal, the Tribunal will close her file as the Tribunal is unable to proceed with the application for reconsideration based on the submissions received on March 20, 2023.
28. On April 20, 2023, Ms. Yau sent the Tribunal her written submissions, a 2022 performance review from her current employer and a letter from a colleague who worked with her when she was in the employ of the Employer. In her submissions, she inquired “can I submit my T4A as proof of receiving EI back in 2021? In (sic) a later date since I am at work now.” On April 21, 2023, the Tribunal informed Ms. Yau to provide the Tribunal with her T4A and any additional supporting documents by no later than April 24, 2023.
29. On April 24, 2023, Ms. Yau emailed the Tribunal asking for “an extension to look for the 2021 T4E, for the EI benefit” because her “mom was rushed to the emergency in Mount Saint Joseph over the weekend”. On the same date, the Tribunal responded and granted Ms. Yau’s request to provide her 2021 T4E and any additional supporting documents no later than May 1, 2023.
30. On April 28, 2023, Ms. Yau emailed the Tribunal asking for a further extension until May 31, 2023, to deliver her 2021 T4E because she could not find it and felt that “CRA probably did not send it” to her. She said she could not call CRA for a copy as CRA workers are on strike. On May 2, 2023, the Tribunal responded to Ms. Yau granting her an extension to provide her 2021 T4E and any additional documents no later than May 31, 2023.

31. On May 31, 2023, the Tribunal received Ms. Yau’s 2021 T4E document as well as her Discharge Summary from Royal Columbian Hospital for the “brain surgery”. The document shows that she was admitted on May 18, 2022, but the discharge date is missing.
32. On June 12, 2023, the Tribunal informed the parties that Ms. Yau’s reconsideration application has been assigned to a Panel for determination and if the application is not dismissed, the Tribunal will seek submissions from the Employer and the Director on the merits of the application. If the Panel determines all or part of the application should be dismissed the Panel will issue a decision.

## ISSUES

33. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should vary or cancel the original decision. There is also a preliminary issue of whether the Tribunal should extend the reconsideration period or deadline.

## SUBMISSIONS of MS. YAU

### *i. Extension to the statutory reconsideration period*

34. With respect to the reason for requesting an extension to the statutory reconsideration period, Ms. Yau says:

I have someone that can back me up with respect to the unfounded and untruthful claims made by [the Employer]. This person has been recently hospitalized. That’s why I need a bit more time, hopefully I don’t need more than one month.

She also submitted a discharge document from the Royal Columbian Hospital on May 31, 2023, to the Tribunal as proof of her brain surgery on May 18, 2022. Presumably the document was in support of her application for extension of the statutory reconsideration period. The discharge document, curiously, does not show the date of her discharge from the hospital. It is left blank or appears to be blank where it says “Discharged” but shows “Admitted: 18/05/2022”.

### *ii. Merits of the reconsideration application*

35. On April 20, 2023, Ms. Yau provided her submissions on the merits of her reconsideration application which she called “Tribunal notes”. I have read these submissions and do not find it necessary to reiterate them verbatim here. It suffices to say that Ms. Yau’s submissions, in large part, reiterate the evidence and argument made to the Director during the investigation of the Complaint, and in the appeal of the Determination, that the length of her tenure with the Employer is evidence of her meeting the performance standard established by the Employer, and she would not have been assigned difficult and complex files if she were incompetent. As in the appeal of the Determination, she largely augments her position by attempting to provide more particulars to attempt to establish that the Employer’s evidence is unreliable and should not be believed. More particularly, she is disputing the evidence of the Employer in the investigation upon which the adjudicating delegate’s finding of facts were made concluding that the Employer sufficiently demonstrated that it communicated a reasonable expectation to Ms. Yau,

warned her that failure to meet the standard would result in the termination and provided a reasonable period of time for Ms. Yau to improve her performance and meet the standard which she failed to do.

36. Together with these submissions, Ms. Yau included a document from her current employer entitled “PERFORMANCE REVIEW 2022” setting out her attendance, “work ethics” and performance in her new employment signed by her Personal Lines Manager. She also includes a short statement from her former colleague, Sushma Bajaj (“Ms. Bajaj”), who worked with her for the Employer, expressing her shock “to hear all allegations against Ms. Yau” and speaks of Ms. Yau in laudatory terms. The statement is dated April 19, 2023.
37. On May 31, 2023, Ms. Yau also sent the Tribunal her 2021 T4E receipt and her Royal Columbian Hospital (the “Hospital”) discharge document. The latter document, as discussed above, was likely in support of her application for an extension of the statutory reconsideration period.

## ANALYSIS

38. Section 116 of the *ESA* delineates the Tribunal’s statutory authority to reconsider any order or decision of the Tribunal:

### Reconsideration of orders and decisions

- 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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
- (2) The director or a person served with an order or a decision of the tribunal may make an application under this section.
- (2.1) The application may not be made more than 30 days after the date of the order or decision.
  - (2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.
- (3) An application may be made only once with respect to the same order or decision.

39. A review of the decisions of the Tribunal reveals certain broad principles applicable to reconsideration applications have consistently been applied. The following principles bear on the analysis and result of this reconsideration application.

40. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion. (See *Re: Ekman Land Surveying Ltd.*, BC EST # RD413/02)

41. In *Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with restraint:
- . . . the Act creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute. . . .
- There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” not be deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.
42. *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.*, BC EST # D313/98, delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include:
- (i) whether the reconsideration application was filed in a timely fashion;
  - (ii) whether the applicant’s primary focus is to have the reconsideration panel effectively “re-weigh” evidence already provided to the adjudicator;
  - (iii) whether the application arises out of a preliminary ruling made in the course of an appeal;
  - (iv) 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;
  - (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.
43. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal’s own decisions, as indicated previously, there is a preliminary question in this case, namely, whether or not the Tribunal should extend the statutory reconsideration period.
44. Section 116(2.1) provides that an application for reconsideration must be made within 30 days after the date of the order or decision. The original decision was made on February 23, 2023. Therefore, the deadline to file the reconsideration application was Monday, March 27, 2023 (as 30 days fell on March 25 which was a Saturday). On March 20, 2023, Ms. Yau submitted her incomplete Reconsideration Application Form without identifying the specific decision she was applying to reconsider and without any written submissions on the merits and supporting documents.
45. She did check-off, on the Form, a request for an extension to the statutory reconsideration period asking for an extension to April 20, 2023, to file her submissions and materials because she said: “I have someone



that can back me up with respect to the unfounded and untruthful claims made by [the Employer]. This person has been recently hospitalized.”

46. Subsequently, on March 22, 2023, she rectified her oversight on the Reconsideration Application Form after the Tribunal alerted her to this error and identified to the Tribunal that she was applying to have her original decision reconsidered.
47. On April 20, 2023, Ms. Yau submitted her written submission and supporting documents, and subsequently sought a further extension to submit other documents, including her hospital discharge document which she submitted on May 31, 2023.
48. Effectively, Ms. Yau’s completed reconsideration application was about 2 months past the statutory reconsideration period.
49. Section 109(1)(b) of the *ESA* provides that the Tribunal has the power to extend the time period for requesting an appeal or applying for reconsideration even though the period has expired. However, extensions are not granted as a matter of course, but only for compelling reasons with supporting evidence.
50. In *Inderjit Aulakh*, 2021 BCEST 19, the Tribunal considered the decision in *Serendipity Winery Ltd.*, BC EST #RD108/15, and stated:

The Tribunal approaches requests for extensions of the reconsideration time period consistent with the approach taken to extensions of time in appeals. In *Serendipity Winery Ltd.*, ... the Tribunal stated:

I see no reason to deviate from the criteria [set out in *Re Niemisto*, BC EST # D099/96] when considering requests for an extension of the time period for filing reconsideration applications. However, the question of whether there is a strong *prima facie* case must take into account that the Tribunal’s discretionary authority to reconsider under section 116 of the *Act* is exercised with restraint – see *The Director of Employment Standards (Re Giovanni (John) and Carment Valaroso [sic])*, BC EST # RD046/01 – and must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted. (at para. 21)

51. The burden is on an appellant to demonstrate the appeal or reconsideration period should be extended. In determining whether to extend the appeal period, the Tribunal considers the following factors (see *Niemisto, supra*):
- a) whether there is a reasonable and credible explanation for the failure to file the completed appeal on time;
  - b) whether there has been a genuine and ongoing *bona fide* intention to appeal the determination;
  - c) whether the respondent party and the Director have been made aware of the intention to appeal;
  - d) whether the respondent party will be unduly prejudiced by granting the extension; and,
  - e) whether there is a strong *prima facie* case in favour of the appellant.

52. This is not an exhaustive checklist of factors. In determining whether to extend the statutory time limit, the Tribunal will consider and weigh all salient factors and evidence together in the circumstances (See *Re Patara Holdings Ltd. (cob Best Western Canadian Lodge and/or Canadian Lodge)*, BC EST # D010/08; reconsideration dismissed BC EST # RD053/08).
53. In this case, I do not find there is any reasonable and credible reason for Ms. Yau's failure to file a completed reconsideration application on time. While she says she had someone who could back her up with respect to "unfounded and untruthful claims" made by the Employer but that person was "recently hospitalized" and that is why she required "a bit more time", the time to adduce her evidence to challenge that of the Employer was during the investigation and before the Determination was made and she does not explain why she did not do that. Reconsideration process is not the time to adduce, for the first time, more evidence to augment one's case. Further, Ms. Yau also does not disclose who this witness is and what evidence the witness has precisely. It is more probable than not there was no such witness because on April 20, 2023, she simply submitted her own written submissions together with her performance review from 2022 from her current employer and her former colleague, Ms. Bajaj's short statement expressing her shock "to hear all the allegations against Ms. Yau" and laudatory comments. Nothing significant in the nature of evidence showing "unfounded and untruthful claims" made by the Employer is presented by Ms. Yau.
54. As for the discharge document from Royal Columbian Hospital Ms. Yau produced as "proof of brain surgery" she underwent on May 18, 2022, I presume this document is adduced in support of her application for extension of the statutory reconsideration period. The document shows that she was admitted to the Hospital on May 18, 2022, but curiously there is no discharge date indicated in the discharge document. It should be noted that Ms. Yau also sought a few extensions to the appeal deadline when appealing the Determination. In the Appeal Form dated November 25, 2022, she indicated the reason for her request for an extension to the appeal period is that "I recently had a brain surgery & my mom has been really sick & I am the only one she has". The Tribunal Member noted that she did not provide any supporting documentation specifying when the surgery took place and/or her limitation as a result of the surgery. Similarly, she does not disclose her limitations from the surgery this time, if any, that prevented her from filing her reconsideration submissions late.
55. On the whole, I am not convinced there is a reasonable and credible explanation for the failure of Ms. Yau to file the completed application for reconsideration on time and I dismiss her application for an extension of the reconsideration appeal period and the reconsideration application.
56. Even if I had not dismissed the reconsideration application on the basis of untimeliness, I would have dismissed the reconsideration application based on the merits. More particularly, Ms. Yau's application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra*. The application fails to make out an arguable case of sufficient merit to warrant a reconsideration; it does not raise any important questions of law, fact, principle, or procedure of importance to the parties and/or their implications for future cases. It also does not show *any* error in the original decision, or present other circumstances that requires this panel to intervene.
57. Ms. Yau's reconsideration application is in the nature of a third kick at the can, having failed to obtain a favourable outcome on her claim for compensation for length of service in the Determination and subsequently in the original decision, she is rearguing her case before the reconsideration panel by

augmenting her submissions previously made to the Director in the investigation of the Complaint and to the Tribunal Member in the appeal of the Determination. The Tribunal's reconsideration power under section 116 of the *ESA* is not intended to allow a party to augment their submissions made on appeal or previously, in the investigation of a complaint. This would run counter to sections 2(d) and 110 of the *ESA*. Section 2(d) states that one of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes and section 110 of the *ESA* emphasizes the notion of finality to Tribunal decisions (see *Director of Employment Standards (Re)*, BC EST # RD179/03).

58. In the result, Ms. Yau's reconsideration application is denied.

### **ORDER**

59. Pursuant to section 116 of the *ESA*, the original decision, 2023 BCEST 7, is confirmed.

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**Shafik Bhalloo, K.C.**  
**Member**  
**Employment Standards Tribunal**