

An application for Reconsideration

- by -

Fired Up Events & Catering Inc.  
("Fired Up")

- 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* (as amended)

**TRIBUNAL MEMBER:** Carol Ann Hart

**FILE No.:** 2008A/32

**DATE OF DECISION:** May 23, 2008

## DECISION

### SUBMISSIONS

Ella Dreyschner	on behalf of Fired Up Events and Catering Inc.
Andres Barker	on behalf of the Director
Trevor Schmidt	the Respondent

### OVERVIEW

1. Fired Up Events and Catering Ltd. (“Fired Up”) seeks a reconsideration under section 116 of the *Employment Standards Act* (the “*Act*”) of a Decision of the Employment Standards Tribunal BC EST #D025/08, dated February 26, 2008 (the “Original Decision”).
2. In the Original Decision, the appeal filed by Fired Up was dismissed on the basis that the appellants had not filed the appeal on time. The Tribunal confirmed the Determination made by a Delegate of the Director of Employment Standards (the “Delegate”) on October 18, 2007 (the “Determination”) that Fired Up owed Trevor Schmidt compensation in the total amount of \$1323.39, along with any additional interest calculated under section 88 of the *Act*.
3. The Original Decision also confirmed the Determination in respect of the four administrative penalties of \$500.00 each under section 29 of the *Employment Standards Regulation*, B.C. Reg 396/95 (the “*Regulation*”).

### ISSUES

4. There are two issues in this reconsideration:
  1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
  2. If it does, should the decision be cancelled, varied, or sent back to the Member?

### BACKGROUND

5. According to undisputed facts, as set out in the Determination, Trevor Schmidt was hired by Fired Up as a Chef at their restaurant. He worked there from about May 2006 to March 25, 2007. After Mr. Schmidt’s employment was terminated, he filed a complaint alleging that Fired Up had failed to pay amounts owing to him under the *Act*.
6. In the Determination, the Delegate found that Mr. Schmidt was not reimbursed for business costs owing to him in the amount of \$228.00; and that he was entitled to the amount of \$518.47 owing for vacation pay; and the amount of \$576.92 for compensation for length of service. The Delegate also ordered Fired

Up to pay four administrative penalties of \$500 each for its contraventions of sections 21, 58, 63 of the *Act*, and section 46 of the *Regulation*.

## **ARGUMENT**

### ***For the Appellants***

7. In the Reconsideration Application Form dated March 18, 2008, Ms. Dreyschner wrote that there was not enough supporting documentation from the employer on the file. Copies of a number of electronic mail messages were attached.
8. In a letter dated March 18, 2008 attached to the Reconsideration Application Form, Ms. Dreyschner wrote: “*we feel that our case has not been presented properly*”.
9. Ms. Dreyschner also raised issues in that letter relating to the situation following Mr. Schmidt’s employment with Fired Up, which will be addressed below.

### ***For the Director***

10. The Delegate submitted that the request for reconsideration was without merit. The appellants had not met the first stage of the test concerning the decision as to whether to exercise the discretionary reconsideration power set out by the Tribunal in *Milan Holdings Ltd.*, BC EST #D313/98. To satisfy the first stage of the test, the appellant must raise a serious question of law, fact or principle or procedure that is so significant that the original decision should be reviewed.
11. The Tribunal Member had dismissed the appeal of Fired Up on the basis that it was filed out-of-time; there was no reasonable explanation for the late filing; and no reasonable argument was offered that could be interpreted as grounds for appeal. In requesting reconsideration, Fired Up submitted that its case had not been properly presented, and it had new evidence to put forward. The argument of Fired Up on reconsideration did not address the reasons for the Member’s decision to dismiss the appeal.
12. In the alternative, with respect to the new evidence submitted with the Application for Reconsideration, the Delegate maintained that the submission of the appellants did not contain anything which would lead to the conclusion that the analysis of the Member on appeal was flawed.

### ***For the Respondent***

13. In his written submission dated April 13, 2008, Mr. Schmidt maintained that the reasons of the employer for requesting reconsideration were entirely insufficient, and the request should be denied. Fired Up had been given ample opportunity to present its case. Mr. Schmidt wrote that he had received Employment Insurance payments for less than two weeks in April 2007, and had attained full-time employment on May 1, 2007, terminating his EI coverage.

## ANALYSIS

14. The *Act* confers an express reconsideration power on the Tribunal. Section 116 provides:
  - (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.
15. In *Milan Holdings Ltd.*, BC EST #D313/98, the Tribunal set out a two-stage process for making decisions concerning its exercise of the reconsideration power. The first stage is for the Tribunal to decide whether the matters raised in the application in fact warrant reconsideration.
16. In determining this question, the Tribunal will consider a number of factors including: (a) whether the reconsideration application was filed in a timely fashion; (b) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (c) whether the application arises out of a preliminary ruling made in the course of an appeal; (d) 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; (e) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
17. The Tribunal outlined a non-exhaustive list of circumstances in which an application for reconsideration will be successful in several decisions beginning with *Re Zoltan Kiss*, BC EST #D129/96 (QL). These grounds include:
  - a) The member fails to comply with the principles of natural justice;
  - b) There is a mistake in stating the facts;
  - c) The decision is not consistent with other decisions based on similar facts;
  - d) Some significant and serious new evidence has become available that would have led the member to a different decision;
  - e) A serious mistake was made in applying the law;
  - f) A significant issue in the appeal was misunderstood or overlooked; and
  - g) The decision contains a serious clerical error.
18. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. (See *Re Ekman Land Surveying Ltd.*, BC EST #D413/02 (QL), and *Voloroso* (BC EST #RD046/01)). It was not intended that the reconsideration process would provide parties with an opportunity to re-argue their case.

19. The Tribunal Member deciding the appeal (the “Member”) correctly set out in the Original Decision that the burden was on the appellant to show that compelling reasons exist for the Tribunal to extend the time for filing an appeal, and cited the Tribunal decisions in *Matty Tang*, BC EST #D211/96 and *Niemisto*, BC EST #D099/96.
20. He then outlined and considered the following criteria for applications for an extension of time to file an appeal which have been developed by the Tribunal in various decisions, including *Re: Denill (c.o.b. Fibremaster Restorations & Carpet)*, BC EST #D080/01:
1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  2. there is not an unreasonably long delay in filing the appeal;
  3. there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
  4. the respondent and the Director have been made aware of this intention;
  5. the respondent party will not be unduly prejudiced by the granting of the extension; and
  6. the appellant has a strong *prima face* case that might succeed.
21. The Member considered the reason given by Fired Up for the late filing of the appeal. Fired Up had indicated in its submission for the appeal that the principals of Fired Up were busy restaurant owners and that the Delegate had failed to return calls after the Determination had been issued.
22. The Member concluded that Fired Up had not tendered any reasonable explanation for the late appeal, and that it had failed to establish its intention to appeal the Determination prior to the deadline.
23. On reconsideration, Fired Up has not provided any further evidence or explanation concerning the late filing of the appeal. It has therefore not set out any reason why the Member’s decision was incorrect. The appeal was filed 22 days late, and it has not been established that the decision of the Member not to grant an extension of time to file the appeal, in the circumstances, was improper.
24. In summary, the request for reconsideration fails in the first stage of the two-stage analysis referred to in *Milan Holdings Ltd., supra*. Therefore, it is not necessary for me to pursue the analysis in the second stage—that is, consider the merits of the application. However, I will proceed to comment briefly on the remainder of the submissions for the application for reconsideration.
25. In a letter dated March 18, 2008 attached to the Reconsideration Application Form, Ms. Dreyshner wrote that she wished to present evidence about how Mr. Schmidt had been treating the employees of the company; and that following his termination, he had been trying to convince past employees of Fired Up to take actions against the company for “*unjust causes*”. Ms. Dreyshner further alleged that Mr. Schmidt had been applying for Employment Insurance benefits without advising Employment Standards, and had provided false information in his Employment Insurance application. A copy of an e-mail dated March 11, 2008 from Saithip Sangsingkeaw was also provided. None of this evidence would be relevant in the instant case, as it relates to allegations concerning the situation after Mr. Schmidt had ceased to be employed by Fired Up.

26. With respect to this request for reconsideration, Ms. Dreyshner also submitted copies of e-mails which were sent during the time of Mr. Schmidt's employment with Fired Up. There was no explanation as to why those e-mails were not provided to the Delegate during the investigation, or to the Member on appeal.
27. It was uncontested that Fired Up did not participate in the Delegate's investigation of the complaint. The Delegate made repeated requests for Fired Up to provide information, but no records were ever submitted. Although Fired Up was duly notified of the hearing conducted by the Delegate, no representative for Fired Up attended the hearing. The Tribunal has consistently not allowed parties to adduce evidence on appeal that should have properly been before the Delegate (See *Re Tri-West Tractors Ltd.*, BC EST #D268/96; and *Kaiser Stables Ltd.*, BC EST #D058/97).
28. Fired Up has not shown that the Member was incorrect in his conclusion that Fired Up had not set out any reasonable argument based on the grounds of appeal set out in section 112 of the *Act*.
29. For the above reasons, the reconsideration application is dismissed.

## **ORDER**

30. I order pursuant to section 116 of the *Act* that the Original Decision dated February 26, 2008 be confirmed with interest to be calculated to date.

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**Carol Ann Hart**  
**Member**  
**Employment Standards Tribunal**