

An Application for Reconsideration

- by -

The Director of Employment Standards  
and  
Kate Roberts operating as Flaming June Day Spa  
and  
Fariba Basiri

- 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

**TRIBUNAL MEMBER:** John M. Orr

**FILE No.:** 2004A/69, 2004A/82 & 2004A/84

**DATE OF DECISION:** August 4, 2004

## DECISION

### OVERVIEW

This reflects applications by the Director of Employment Standards, Kate Roberts (“Roberts”) operating as Flaming June Day Spa and by Fariba Basiri (“Basiri”) pursuant to Section 116 (2) of the *Employment Standards Act* (the “Act”) for reconsideration of a Tribunal decision #D056/04 (the “Original Decision”) which was issued by the Tribunal on March 30, 2004.

Basiri was hired as a receptionist for a period of time by Roberts at some form of business called the Flaming June Day Spa. It appears that her work performance was inadequate and her employment was terminated. Basiri filed a complaint alleging that she entitled to compensation for length of service and overtime wages. After conducting an investigation the Director’s delegate issued a Determination finding that Basiri had been dismissed without just cause, and that she was entitled to compensation for length of service.

Roberts filed an appeal and the appeal was addressed by way of written submissions. The Tribunal’s Adjudicator found that the delegate made an error in law in not finding just cause for dismissal. The Adjudicator varied the Determination to eliminate the claim for compensation for length of service but upheld the finding of certain other wages owing together with the penalty imposed by the director.

The Director seeks reconsideration of the original decision on the grounds that the behaviour used to justify dismissal did not occur during working hours. The Director also notes that the Adjudicator in varying the Determination used an incorrect amount for the other wages owing.

Roberts seeks reconsideration on the basis that the delegate miscalculated the wages owing to Basiri because overtime wages were banked.

Basiri seeks reconsideration based on the same arguments about the lack of reasonable grounds for dismissal that were presented to the delegate and to the adjudicator.

### ANALYSIS

The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.*, BCEST #D313/98. The Tribunal sets out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively “re-weigh” evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or

procedure of sufficient merit to warrant the reconsideration. The decision states, "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

In my opinion this is not a case that warrants the exercise of the reconsideration discretion, save and except for the necessity to correct an error in the final amount owing. The submissions made by each of the parties on this reconsideration application only reiterate the arguments that have already been decided either by the delegate and/or by the adjudicator in the original decision.

The argument raised by the Director was addressed by the adjudicator. The Director submitted that because the employee was required to attend the workplace 15 minutes before work start time she could not be disciplined for being late within that time. However the Director's delegate found that the 15-minute time period was properly considered "work" and awarded wages for that period of time. It is inconsistent for the delegate to then submit that the employee was not subject to direction and discipline during that time period. I find that the adjudicator's reasoning in this regard is perfectly reasonable and without error.

Robert's argument is one that either should have been made prior to the Determination being made or to the adjudicator. To the extent that it was made I find that it is not now subject to further review.

All of the arguments submitted by Basiri on this application for reconsideration have been made previously in the process and both the delegate and the adjudicator provided reasons for finding against her and made rational findings of fact in regard to her submission. It is not the purpose of the reconsideration procedure to simply re-argue the points already properly and fairly dealt with.

The purpose of the reconsideration process is not to substitute my opinion for that of the delegate or the adjudicator. The arguments presented by all of the parties were presented fully to the adjudicator and they were considered carefully. The delegate and the adjudicator considered the relevant jurisprudence. There is no suggestion in the application that the adjudicator failed to understand the arguments or failed to give the submissions due consideration. There is no clear error in law.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the Adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

However, there is an error on the face of the original decision. The Adjudicator cancelled the claim for compensation for length of service but upheld the claim for regular wages and overtime. Unfortunately, the Adjudicator picked up the incorrect figure from the Determination. The Adjudicator found that wages owing were \$408.98 (actually the amount of compensation for length of service) instead of \$544.92 (the amount of regular and overtime wages).

## **ORDER**

The application to reconsider the decision of the adjudicator in this matter is granted to the extent that the original decision is varied to read as follows:

“Pursuant to s.115 of the *Act* the Determination dated October 9, 2003 is varied to eliminate the claim for compensation for length of service, and the Determination is otherwise confirmed in the amount of \$544.92, together with interest in accordance with section 88 of the *Act*.”

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**John M. Orr**  
**Member**  
**Employment Standards Tribunal**