

An application for Reconsideration

- by -

Flora Faqiri

- 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:** John Savage

**FILE No.:** 2005A/161

**DATE OF DECISION:** November 22, 2005

## DECISION

### SUBMISSIONS

Flora Faqiri, for herself

Marti F. Rusen, for Value Village Stores, Inc.

Ian MacNeill, for the Director of Employment Standards

### OVERVIEW

1. This is an application for reconsideration of the Decision of this Tribunal in *Flora Faqiri* BC EST #D107/05. The Tribunal in that Decision declined to extend the time for requesting an appeal that was some months late. The application arises in the following context.
2. Flora Faqiri, the “Employee”, originally complained to the Director of Employment Standards that she was owed compensation for length of service upon termination. Value Village Stores Inc., the “Employer”, alleged just cause.
3. The Employee did not attend the hearing before the Delegate. The Delegate of the Director found for the Employer in determining that there had been just cause for termination. Accordingly, the Employee was not entitled to compensation for length of service.
4. The appeal to this Tribunal was late. The Employee asked that the Tribunal exercise its powers under section 109(1)(c) of the *Employment Standards Act* to extend the time for making an appeal. The Tribunal declined. It found that there was no reasonable and credible explanation for the failure to request an appeal within the statutory time limit and the appellant failed to produce a strong *prima facie* case.
5. The application for reconsideration, then, concerns whether this Tribunal erred in declining to extend the time for requesting an appeal.

### ISSUE

6. Should the Tribunal reconsider its decision to decline to extend the time for requesting an appeal?

### LEGISLATION

7. On application this Tribunal may reconsider its own decisions. Section 116 provides as follows:

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 named in a decision or order of the tribunal may make an application under this section.
- (3) An application may be made only once with respect to the same order or decision.

1995, c. 38, s. 116; 2002, c. 42, s. 62; 2003, c. 65, s. 12.

## DISCUSSION & ANALYSIS

8. The question of whether this Tribunal should exercise its power to reconsider a decision involves a two stage process. First, the panel must determine whether the matters raised in the application merit reconsideration. The second stage of the analysis, if the first test is met, involves reconsideration of the merits of the Decision. See, for example, *Re Annable*, BC EST RD#559/98.
9. A review of the cases establishes the following principles: (1) reconsideration of a previous decision is not a right to which a party is entitled, (2) reconsideration is undertaken at the discretion of the Tribunal but only in exceptional circumstances, (3) since the scheme of the Act intends that Tribunal decisions be final and binding, the power to reconsider must be applied cautiously: *Re Ekman Land Surveying Ltd.*, BC EST RD#413/03, *Re World Project Management Inc.*, BC EST #D134/97, *Re Allard*, BC EST #D265/97.
10. Although not exhaustive, the following have been held to be grounds for reconsideration: (1) a failure of the Tribunal to comply with principles of natural justice, (2) a mistake of fact, (3) inconsistency with previous decisions not distinguishable on the facts, (4) credible evidence only newly available, (5) mistakes of law, and (6) misunderstanding or failing to deal with an issue: *Re Kiss*, BC EST D#122/96.
11. In the present case the reasons provided for reconsideration are (1) a desire by the Employee to be vindicated and establish her honesty and (2) an opportunity to establish a bias in her supervisors. The Employee attached a laudatory evaluation signed by a former supervisor.
12. As noted, the member had before her only the question of whether she should extend time for filing the appeal. The member considered the six factors germane to that question established in such cases as *Re Niemisto*, BC EST #D099/96 and *Re Nature's Choice Foods*, BC EST #D206/04. She found the case could be decided based on two factors, whether there was a reasonable and credible explanation for the delay, and whether there was a strong *prima facie* case in favour of the appellant.
13. On the question of delay, the Employee provided no explanation for her failure to appeal within the statutory time limits to the member. The Employee continues to provide no explanation for failing to meet the statutory time limits on this application for reconsideration. In these circumstances it cannot be alleged that the member erred in her disposition on this issue by finding that this element of the test had not been met.
14. On the second factor considered, the member found that the Employee failed to present a strong *prima facie* case. This is not surprising as the Employee failed to appear at the hearing before the Delegate. The evidence of the Employer went in substantially unchallenged. The submission of the Employee on this

point is to question the credibility of the Employers evidence. Reconsideration is not an opportunity to “re-weigh” the evidence: *Re Town*, BC EST #RD 002/04. An appeal is not an opportunity to submit evidence that could have been adduced in the first instance: *Re Merilus Technologies Inc.*, BC EST # D171/03.

15. In my opinion if a party intends to question the credibility of the evidence of the other party it is incumbent on them to do so in the forum provided for that purpose, by providing their evidence to the Delegate in the first instance. That was not done. It is far too late to provide such evidence on appeal or, worse yet, for the first time on an application for reconsideration.
16. The application for reconsideration is refused. Since the application for reconsideration is refused it is unnecessary to deal further with the merits of the Decision for which reconsideration is sought.

### **ORDER**

17. The application for reconsideration is refused.

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**John Savage**  
**Member**  
**Employment Standards Tribunal**