EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Mykonos Taverna Operating as the Achillion Restaurant
("Mykonos")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/672

DATE OF DECISION: December 29, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Mykonos Taverna operating as the Achillion Restaurant ("Mykonos") of a Determination which was issued on October 19, 1998 (and amended October 22, 1998) by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director found Mykonos had contravened Sections 21(1) and (2), 27(1), 28(1), 34 (2), 46(1) and 63(2) of the *Act* in respect of the employment of Christine Claremont ("Claremont"), Evelyn Gunville ("Gunville"), Darlene Hoy ("Hoy") and Melva Moore ("Moore") and, pursuant to Section 79 of the *Act*, ordered Mykonos to pay an amount of $9294.16.

The appeal has two elements. First, Mykonos says the calculations made by the Director, following the conclusion that deducting cash shortages, unpaid meals and 5% of any tips paid by credit card from the employees' wages contravened Section 21 of the *Act*, are wrong.

The second part of the appeal challenges the conclusion of the Director that Mykonos contravened Section 21(1) and (2) by deducting cash shortages, unpaid meals and 5% of any tips paid by charge card from the wages earned by the employees. Mykonos says the deductions are justified. In the case of the deductions for cash shortages and unpaid meals, Mykonos says they are justified on the basis that Mykonos should not have to bear the cost of either employee negligence or employee dishonesty. In the case of the 5% deduction from tips paid by credit card, Mykonos says they are justified on the basis that Mykonos pays 5% administration fee to the credit card companies and feels the employees should contribute to that cost.

The Tribunal has reviewed the appeal and has decided an oral hearing is not required in this case.

ISSUE TO BE DECIDED

The issue raised by the appeal is whether Mykonos has met the burden of persuading the Tribunal that the Determination ought to be varied or cancelled because the Director erred in fact or in law in reaching the conclusions upon which the Determination is based.

FACTS

The relevant facts relating to this appeal are not in dispute and are set out in the Determination. There were four complaints addressed by the Director in the Determination, one from each of four former employees of Mykonos. Each individual made the same allegations of improper

deduction of shortages, unpaid meals and tips. The findings of fact made by the Director on the allegations was the same for each individual:

> With respect to the allegation that the employee is entitled to the recovery of wages used to pay 5% of the value of tips to the employer when the tip is paid by credit card, the employer acknowledges that he requires his employees to pay this. Further, the employer acknowledges that he required the complainant to pay for till shortages. In addition, the employer acknowledged that he required the complainant to pay for meals and beverages which the customer had not paid for and for any costs arising from a mix-up in a food or beverage order.
>
> While the complainant does not have any records or receipts to prove that the employer made deductions from her wages, she could not produce such records because the employer never provided them. The employer admits it is his practice to make these deductions from his employees because to do otherwise would be a cost to him. The complainant does, however, have an estimated amount which she was required to pay for unauthorized deductions.

I note that although the Determination correctly indicates that none of the individual complainants had records or receipts showing Mykonos made the alleged deductions from their wages, one of the individuals, Claremont, had maintained a fairly comprehensive record showing hours worked, shortage payments and credit card deductions during her employment. This record covered the period of her employment, November 8, 1996 to April 26, 1997 (a period of 23 weeks), and indicated an amount of $236.00 had been deducted for cash shortages and meals and an amount of $199.80 had been deducted on credit card tips. It was delivered to Counsel for Mykonos as an attachment to the reply submission of the Director on this appeal.

In respect of the other individual complainants, the Director made the following conclusions relating to shortage payments and credit card deductions:

name	dates employed	cash shortages and meals	credit card deductions
Gunville	December, 1994 to May 25, 1997	$720.00	$1080.00
Hoy	March 7, 1997 to May 15, 1997	$160.00	$480.00
Moore	June, 1995 to December 31, 1996	$380.00	$900.00

As stated above, the Determination indicates that the amounts found to be owed for the shortage payments and credit card deductions were provided by the each of the complainants as "an estimated amount". The Determination also states the basis upon which the Director accepted these estimates:

> . . . considering that the complainant's allegations are consistent with her co-complainants, and the fact that the employer admits he requires employees to pay unlawful deductions, the employee estimates of the amount of these deductions should be accepted until such time as the employer provides evidence to prove or disprove the claim . . . . The employer should not be rewarded for destroying or withholding evidence with a decision that finds the evidence . . . to be inadequate or insufficient.

ANALYSIS

I will deal first with the argument raised by Counsel for Mykonos that the deductions are justified and do not contravene the *Act*. Section 21 of the *Act* reads:

> *21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
>
> *(2) An employer must not require an employee to pay any part of the employer's business costs except as permitted by the regulations.*
>
> *(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

The Tribunal has accepted that costs incurred by an employer because of employee carelessness or dishonesty are contemplated by the phrase *"employer's business costs"* in subsection 21(2). Accordingly, the *Act* prohibits employers deducting wages to pay for carelessness or dishonesty, *"except as permitted by the regulations"*. The *Regulations* do not apply to this case and the Director correctly concluded that the deductions for alleged carelessness and dishonesty contravened the *Act*.

The cost of being able to do business with credit card companies is also contemplated by the phrase *"employer's business costs"*. The decision to assume the 5% administration cost for

the convenience of being able to accept credit cards was a conscious business decision by Mykonos and is a cost that Mykonos is not permitted to pass on to its employees. Again, the Director correctly concluded that the 5% deduction for credit card tips contravened the *Act*.

Mykonos has not demonstrated any error in the Determination relating to the conclusion that the deductions made from the individuals' wages contravened the *Act*.

I turn to the argument relating to the calculations made by the Director of the amounts owed by Mykonos for the unlawful deductions. Mykonos argues the estimates are not just wrong, but they are manifestly unfair. Counsel for Mykonos makes the following point in his submission:

> To show the startling unfairness of these calculations one need only look at the calculation sheet for Darlene Hoy. In that case, Ms. Hoy was employed for a total of nine weeks from March 7, 1997 to May 15, 1997. The calculation is that the unlawful deductions for tips paid to the employee by charge card was $480.00. It is clear that the Director did not have any evidence upon which to base this calculation but it is instructive to the appeal to calculate what this $480.00 "unlawful deduction" amounts to.
>
> It has been confirmed by the employer as well as the Director of Employment Standards that the employer, when presented with a tip that was provided by charge card, deducted 5 percent of that tip from the employee's pay cheque. For example, if the bill came to $100.00 and the tip was $20.00, the employer advanced the $20.00 tip by way of cash from the till and took back $1.00 at a later date. . . .
>
> In the case of Darlene Hoy, $480.00 is alleged to represent 5 percent of her charge card tips over nine weeks. Extrapolated, this means that in nine weeks time on charge card payments only, Ms. Hoy was tipped a total of $9600.00 or, $1050.00 per week.

No similar extrapolation was provided in the appeal for any of the other individuals. If one had been done, it would have revealed that Claremont's claim was calculated on tips averaging about $55.00 a week from credit card payments, Gunville's claim was calculated on tips averaging about $175.00 a week from credit card payments and Moore's claim was calculated on tips averaging about $225.00 a week from credit card payments.

In reply to this part of the appeal, the Director says:

> With respect to the issue of Quantum concerning deductions for costs associated with the VISA fee neither the employer or the employees have kept an accurate record. The employer has acknowledged making deductions (which are contrary to the Act) but did not produce evidence as to the amounts

> deducted. The onus is on the appellant, in this case the employer, to prove the Determination is incorrect. In the absence of employer records to the contrary the Director has accepted the figures on VISA fees deducted provided by the complainants. The employer should not benefit from a failure to keep records of unlawful deductions.

I accept that the appellant bears an onus in this appeal. But to suggest the nature of that onus in this case is to show that the calculations are "incorrect" is to put too fine a point on it. It is probable the appellant could no more show the calculations to be incorrect than the Director could show them to be correct. As suggested by the Tribunal in *World Project Management Inc. et al*, BC EST #D134/97 (reconsideration of BC EST #D325/96), it is essential that the appeal process be fundamentally fair and efficient and that the nature of the burden in any particular case reflect those fundamental considerations.

After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

Before applying the above principles to the circumstances of this appeal, I need to address one more matter. In the appeal, which was filed with the Tribunal on October 26, 1998, Counsel for Mykonos says:

> It is not our intention to go into great detail with regard to the details of these calculations. We wish to make a more calculated and detailed submission as to why we feel the Director is in error at a later date. This is because of the short period of time allowed for the filing of an appeal and the fact that we had not received instructions until Friday, October 23, 1998.

The Director filed a reply submission, dated November 10, 1998, and the Tribunal forwarded that submission to Counsel for Mykonos along with a covering letter stating, *inter alia*: "If you wish to make a reply please do so no later than **4:00 pm November 30, 1998.**" No reply was received and no "more calculated and detailed submission" has been received.

Only three reasons are given in the Determination for accepting the estimates provided by the employees: first, the allegations of each employee are consistent with the others; second, the employer admitted he required the employees to pay the unlawful deductions; and third, the employer should not be rewarded for "destroying or withholding evidence". I find none of these reasons adequately explain why the estimates were determined to be "fair and reasonable".

In respect to the first reason, while I agree the allegations of each individual are consistent, the estimates given by each individual are clearly *not* consistent. When analyzed, the estimate submitted by Hoy strains credulity. There is no indication how the Director rationalized the estimate of Hoy, which indicates she earned in excess of $1000.00 a week in credit card tips, with the estimates provided by Gunville and Moore, indicating they earned about $175.00 and $225.00 a week in credit card tips, respectively, and the information of Claremont, indicating she earned about $55.00 a week in credit card tips.

The second reason listed by the Director is no reason at all for accepting the estimates given by the individuals. The admission by Mykonos only establishes the contravention of the *Act* and provides the basis for requiring Mykonos to pay wages in respect of that contravention. It does nothing to assist in establishing the amount of wages owed or providing a reason for accepting the estimates of the individuals.

In respect of the third reason, I note first that there is no conclusion of fact made in the Determination that the employer did "destroy or withhold evidence" nor any conclusions of fact consistent with that comment. I can find no basis for the Director asserting Mykonos destroyed or withheld evidence nor even any basis for suggesting that Mykonos failed or refused to co-operate with the investigation. In the absence of some factual support for that assertion, it is neither fair nor reasonable for the Director to use it as a basis for accepting the estimates of the individuals.

Even in reply to the appeal, I note the Director has not suggested that Mykonos should be foreclosed from challenging the calculations because he failed or refused to co-operate in the investigation process.

As a result, I find the reasons given in the Determination do not set out a fair and rational basis for accepting the estimates provided by the complainants.

That does not, however, end the matter. The Tribunal has taken a broad and purposive approach to appeals challenging the validity of information received and relied upon by the Director during an investigation. The Tribunal has been loathe to disturb calculations made by the Director if the Determination and the material on file show there was some rational basis for the Director to rely on the information received from the individuals or if the appellant is unable to show there is no rational basis for the conclusion of the Director. Counsel for Mykonos indicated in its appeal submission that a "more calculated and detailed submission" was contemplated. On November 30, 1998, Counsel for Mykonos was asked to respond to the

submission of the Director on the appeal. The Director's reply included additional documents relating to the calculations made by the Director. No reply was received.

Apart from the submission made by Counsel for Mykonos on the estimate of the wages owed to Hoy in respect of the contravention of Section 21, the appellant has not attempted to establish the basis for asserting that the calculations are unfair or unreasonable. Nor is there anything in the material on file that demonstrates the estimates provided by Claremont, Gunville and Moore are unfair or unreasonable. In the absence of some reason to conclude the accepted estimates are unfair or unreasonable, the appellant has failed to meet its onus and I will not disturb the conclusions of the Director in respect of those three individuals.

I do find the onus has been met in respect of Hoy. A conclusion that a restaurant employee, working 2-3 days a week, sometimes only 1 or 2 hours a day, could earn more than $1000.00 a week in credit card tips alone is inherently improbable. The inherent improbability that Hoy's estimate was accurate requires the Director to give some reason why her estimate was considered to be fair and reasonable. In the absence of some rational basis for that conclusion, either in the Determination or in the supporting material, it would be unfair and unreasonable to allow it to stand.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 19, 1998 be referred back to the Director in respect of the calculations relating to the amount of wages owed to Hoy because of the contravention by Mykonos of Section 21 of the *Act*. The remainder of the Determination is confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal