BC EST #D010/99
Reconsideration of BC EST #D396/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* S.B.C. 1995, C.38

- by -

D & T Taiwanese Restaurant Ltd

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

RECONSIDERATION PANEL:	John M. Orr
FILE NO.:	98/679
DATE OF DECISION:	January 13, 1999

DECISION

OVERVIEW

This is an application by D & T Taiwanese Restaurant Ltd ("D&T") under Section 116 (2) of *the Employment Standards Act* (the "*Act*") for a reconsideration of Decision No. D396/98 (the "Decision") which was issued by the Tribunal on September 03, 1998.

This case involved a finding in regard to the number of hours worked on a daily basis by an employee, Yan Zhang ("Zhang"), at a restaurant owned by D&T. The Director found that Ms Zhang worked 7 hours per day but Ms Zhang appealed to the Tribunal and the Adjudicator found that the Director's delegate erred and referred the matter back to the Director to calculate wages based on his finding that Zhang worked 8 1/2 hours per day, 6 days per week during her employment with D&T.

D&T submits in its application that the Adjudicator for the Tribunal made five errors in the decision as follows:

1. By creating an apprehension of bias by apparently cross-examining/questioning D&T's witnesses;

2. By allowing the evidence of the appellant, allegedly unavailable previously, without giving full reasons as to why the case law submitted by D&T were irrelevant to the to the case;

3. By considering irrelevant matters, such as the date of when Mr Lee was assaulted by a staff member and reported the incident to the police, when such questioning arose from the adjudicator's own questioning of Mr Lee;

4. By failing to give appropriate weight to the sworn testimony of Sally Wong, the cashier/accountant, who confirmed her working hours as well as the working hours of other employees of D&T;

5. By placing inappropriate weight on the unsworn and pro-forma statements and new documentary evidence submitted by Zhang.

PROCEDURAL HISTORY

On April 16, 1998 the Director issued a Determination in which the delegate found that Ms Zhang was entitled to $1019.16 in unpaid wages and interest. Ms Zhang appealed to the Tribunal based primarily on her submission that the delegate erred in finding that she worked 7 hours per day rather than 8.5 hours per day. A hearing was held at the Tribunal's office on August 26, 1998 at which time evidence was given under oath or affirmation and with the aid of an interpreter.

On September 03, 1998 an adjudicator of the Tribunal gave a written decision, "the Decision", in which he reviewed the evidence and filed materials, the original Determination, and the

submissions of counsel for D&T. The adjudicator found on the evidence before him that Ms Zhang had established that she worked 8.5 hours per day, 6 days per week and referred the matter back to the Director to calculate the proper wages owing together with interest.

The application for Reconsideration is dated October 28, 1998 and was received by the Tribunal on October 29, 1998. It was referred to me on December 18, 1998.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98 (applied in decisions BCEST #D497 and #D498). In *Milan* 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 and weigh 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 that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". In my opinion most decisions would be seen as serious to the parties and this latter consideration should 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, the circumstances in which an application for reconsideration will be successful should be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

> *Those circumstances have been identified in several decisions of the Tribunal, commencing with* Zoltan Kiss,*BCEST #D122/96, and include:*
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> * *failure to comply with the principles of natural justice;*
> * *mistake of law or fact;*
> * *significant new evidence that was not reasonably available to the original panel;*
> * *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
> * *misunderstanding or failure to deal with a serious issue; and*
> * *clerical error*

I would agree with this summary of the position taken to date by the Tribunal except to add that the mistake of fact referred to above must be one that is evident on the face of the record and not a matter of the weight or assessment of evidence. I would further add that, in my opinion, these various approaches have evolved with some flexibility and should continue to do so because reconsideration is a matter of discretion, not of right. No doubt the Tribunal has not yet seen the limits of appellate issues or ingenuity.

In this case the grounds for the application for reconsideration are, for the most part, related to the admissibility, weight and assessment of evidence. It is clear to me that the adjudicator gave due consideration to the submissions of counsel for D&T on these issues at the hearing. He carefully considered the appropriate test for the assessment of credibility as set out in *Faryna v. Chorny* (1952) 2 D.L.R. 354 (B.C.C.A.). and sets out in detail his analysis of the evidence and the reasons for his decision.

I could dispose of this application at the first stage of the process as set out in *Milan* as the application was not timely (some 56 days after the decision) and the primary focus of this application is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator. However, in fairness to the applicant I will address the five specific grounds set out in the application.

Firstly, in reviewing the decision I can see no ground to suggest an apprehension of bias by the questioning of witnesses. It is a normal and acceptable practice in administrative tribunal hearings for an adjudicator to ask questions of witnesses. Many people appearing before the Tribunal are unrepresented by counsel and require assistance and focus in giving relevant evidence and questioning witnesses. It is often the case that where both parties are represented by counsel that the adjudicator will not need to ask questions but, even then, it sometimes necessary to ask questions to ensure clarity in the evidence. The use of the term "cross-examination" in the decision is perhaps inappropriate if it refers to questions by the adjudicator but it is not clear on the record whether such cross-examination was referring to questions by Ms Zhang or the adjudicator. If it refers to questions by the adjudicator then it is simply a misnomer. Although the adjudicator should not take an adversarial role by "cross-examining" witnesses it is quite appropriate to question witnesses to ensure clarity or to assist in the assessment of credibility. On the face of the record before me I can see no error by the adjudicator on this ground.

The admissibility of new evidence at the Tribunal hearing has been the subject of a number of decisions and, quite simply put, such evidence is not usually admissible if it was available at the time of the investigation. However, there remains a discretion to allow such evidence if it is relevant and admissible and was not reasonably available at the time. The adjudicator considered the law on this point and exercised his discretion to admit the evidence. It is not appropriate for me to simply substitute my opinion for that of the adjudicator where he has properly considered the issue.

Counsel for D&T suggests that the adjudicator considered irrelevant matters such as the date when Mr Lee was assaulted and reported to the police. The only reference to this aspect of the evidence is as an example of Mr Lee's difficulty in remembering significant events. The evidence may have been irrelevant to the issue of the hours worked by Ms Zhang but it was relevant to the issue of credibility and the ability of the witness to recall the events accurately. It was for this purpose only that the adjudicator quite properly used this evidence.

The fourth and fifth grounds for the application for reconsideration refer specifically to the weight of evidence. Counsel submits that the adjudicator did not give appropriate weight to the sworn evidence of Sally Wong and gave inappropriate weight to unsworn evidence submitted by Ms Zhang. While I have some concern with the use made of the unsworn letters submitted by Ms Zhang it is clear that the adjudicator considered the sworn evidence of Ms Zhang, Sally Wong, and Wai Yung Lee primarily and carefully. He also considered newspaper advertisements which were submitted and were not disputed as to their authenticity. I can not say that the findings of fact by the adjudicator lack any evidentiary foundation whatsoever or that his findings are patently unreasonable.

In reviewing the totality of the application for reconsideration I can find no compelling reasons to interfere with the decision. I have reviewed, in full, the submissions presented by D&T on this application and can find nothing that would persuade me that there has been a denial of natural justice, any significant new evidence, any misunderstanding of or failure to deal with a serious issue, mistake of law, or that the decision is inconsistent with any other Tribunal decisions.

ORDER

Pursuant to Section 116 of the *Act* I decline to vary or cancel the decision BC EST # D396/98.

John M. Orr
Adjudicator
Employment Standards Tribunal