BC EST #D051/98
Reconsideration of BC EST #D448/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of a reconsideration pursuant to Section 116 of the Employment Standards Act R.S.B.C. 1996, C. 113

- by -

The Director of Employment Standards

(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS:	Paul E. Love Geoffrey Crampton Alfred C. Kempf
FILE NO.:	97/908
DATE OF DECISION:	February 11, 1998

DECISION

OVERVIEW

This is an application by the Director of Employment Standards for reconsideration of a Decision pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"). This application was heard without an oral hearing, and the application was dismissed, as the Adjudicator did not err.

ISSUES TO BE DECIDED

Did the Adjudicator err in commenting on the non-attendance of the Employee and Director's delegate at the appeal hearing ?

Did the non-attendance of the Employer affect the burden of proof ?

Did the Adjudicator err in considering the viva voce evidence of the Employer tendered at the hearing ?

FACTS

Surjit K. Sandhu worked at the place of business of H. B. Kaysons Ltd. Operating as Guru Lucky Sweets & Restaurant ("Guru") for the period of April 17 to 28, 1996. She was training for a job making Indian sweets at its restaurant in Burnaby. She was unable to fulfill the requirements of the position because she was not able to communicate in Hindi, which was a major language used by the customers and Employees at Guru.

After her employment came to an end, she filed a complaint with the Director, claiming entitlement to the minimum wage for all time worked, and alleging that she worked 76.5 hours. The complainant made a mathematical error in her calculations, and the actual time claimed was 85.5 hours. The Director's delegate apparently met or discussed the allegation with the Employer and Ms. Patel, a daughter of the principal of the Employer. The Employer indicated that it had agreed to provide 4 hours per day training to Ms. Sandhu for a practicum period, in order to determine if Ms. Sandhu was capable of full time employment. The Director's delegate found that no records of hours worked were kept by the Employer, and relied on the records that were kept by Ms. Sandhu. The Director's delegate found that the Employer had violated sections 17, 40 and 58 of the Act, and ordered that the Employer cease to violate the Act, and further pay to Ms. Sandhu wages and holiday pay in the amount of $653.36, together with accrued interest of $38.23.

After receiving the Determination, Guru, filed an appeal with this Tribunal alleging that Ms. Sandhu was working pursuant to a practicum agreement, and thus there was no liability for minimum wages. The Employer specifically asked for an oral hearing, because he disputed the information that the Employee provided to the Director's delegate.

Mr. Thornicroft (the "Adjudicator") heard the appeal of this matter. In his Decision he commented upon the non-attendance of Ms. Sandhu and noted the absence of the Director's delegate. The Adjudicator upheld the Determination in part, holding that Ms. Sandhu and Guru entered into an agreement whereby Ms. Sandhu would receive $20.00 per day for a 4 hour per day training period, and when she proved to be suitable would be paid at an a rate of $7.00 per hour for hours worked. The Adjudicator properly held that that this agreement was void, as it violated section 4 of the Act. The Adjudicator found that Ms. Sandhu was employed as a trainee and was entitled to the minimum wage for hours worked. The Adjudicator accepted the evidence of Guru that only 4 hours per day were worked, for a total of 36 hours. The Adjudicator ordered that Guru pay to Ms. Sandhu the sum of $262.08, which consisted of 252.00 (36 hours x $7.00/hour) and 4 % holiday pay, which amounted to $10.08.

Ms. Sandhu in her written submission on this reconsideration indicated that her non-attendance was due to inadvertence – she forgot the hearing date. The written submission from the Director's delegate, dated December 8, 1997 argued:

1. The Adjudicator took into account irrelevant considerations viz. the non-attendance of the Employee and Director's delegate and drew an adverse inference.

2. The Adjudicator improperly proceeded on a "de novo" basis, and relied only on the evidence of the Employer, rather than proceeding on the basis of an appeal, thus placing an onus or burden on the respondents, rather than on the appellant.

3. The Adjudicator improperly relied upon the oral evidence of the Employer, in a case where the Employer had advanced no written records to the Director's delegate.

ANALYSIS

Irrelevant Consideration ?

This Tribunal does not have the luxury of holding an oral hearing for every appeal application. As a matter of policy this Tribunal, because of scarce resources, sets matters for oral hearing only when there is an important issue of fact, law or credibility. This matter was undoubtedly set for oral hearing because there was a dispute on a matter of fact– the number of hours actually worked- and the Employer was suggesting that the Employee had mislead the Director's delegate. The Employer's written submission to the Tribunal reads as follows:

> Surjit Sandhu worked on Practicum from April 17, 96 to April 26, 96. Now She is complaining that she worked 8 Hours per day from April 17/96 – April 27/96 which is false totally. I would like this argument to get oral hearing where Surjit Sandhu, and her parent are present so that Adjudicator can ask questions and get true answers in front of Harsbella and Kanti Ral as well. (sic)

The Employer was clearly raising an issue of credibility of the Employee that related to a finding of fact made by the Director's delegate.

In its written submission the Director's delegate focuses on the following passage of the Decision, contained in the overview:

> Although properly notified, the respondent Employee, Ms. Sandhu, failed to attend the hearing or otherwise contact the Tribunal to explain her absence. I might add that the Tribunal had previously arranged for an interpreter to be present at the hearing to interpret for Ms. Sandhu. An interpreter did attend the hearing as requested, although this attendance proved to be unnecessary.

and the following passage contained in the analysis:

> As for Sandhu's wage claim, although she claimed to have worked some 85 hours, the Employer's evidence is that, at best, she only worked a four-hour shift each day from 1:00 to 5:00 P.M. most days. The Employer's position regarding the hours it says Sandhu worked was clearly set out in the appeal documentation and it stands before me uncontradicted. Although Sandhu could have attended before me to give evidence on her own behalf, she chose not to do so. Similarly, I have no viva voce evidence from the Director as to the hours worked. Accordingly I accept the Employer's evidence as to the days and hours worked.

In making a Decision an Adjudicator should, as Mr. Thornicroft did, set out the parties who attended on an appeal. In the case of a party whose first language is not English, it is important that the Adjudicator set out that the party gave its evidence through an interpreter. In our view, where there is an issue of credibility, and Adjudicator should make a finding on this point. The non-attendance of a party, who can give relevant evidence on a point, can form the basis for an adverse finding on credibility. In our view, it was clearly open to the Adjudicator to draw an adverse inference, given the non-attendance of Ms. Sandhu and the allegation that the Employer set out in its grounds for appeal.

Change in Burden ?

Ms. Sandhu, the Director's delegate and the Employer had a right to be heard at the hearing of the appeal. The Adjudicator found that Ms. Sandhu chose not to attend. In Ms. Sandhu's written submission on this Reconsideration she indicated that she forgot the date. This excuse for non-attendance would not be sufficient grounds for a reconsideration of the Decision.

The nature of the burden on appeal was discussed in the case of *John Ladd's Imported Motor Car Co*, BC EST #D313/96. In this case the Adjudicator held that if the factual underpinnings of the Determination are in issue an oral hearing might be granted. The form of the hearing may take the form of a hearing de novo where the facts are disputed or the credibility of a witness is in issue. The Determination forms the basis of the hearing and frames the issues in dispute. The burden rests with the appellant. The form is more akin to a true appeal, but it has some characteristics of a hearing *de novo.*

The non-attendance of a party does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, and Employee or the Director's delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

The Adjudicator, however, did have *viva voce* evidence from the appellant, which was not substantially different from the evidence the appellant provided to the Director's delegate. The Employer raised an issue of credibility in the appeal, which was not answered by Ms. Sandhu. Apparently the Adjudicator was persuaded that the Employer's information was credible and trustworthy.

Admission of New Evidence?

It is clear that this was not a case where the Employer was seeking to provide new information to the Tribunal, which was not provided to the Director's delegate during the course of the investigation. The information that was provided at the hearing – that the Employee worked 4 hours per day – was the same information that was provided by the Employer to the Director's delegate. In many cases the absence of records might be fatal to the Employer's position. This, however, was a short-term arrangement where the remuneration was fixed for a daily basis, and the training period for each day was a fixed 4 hours. It was open to the Adjudicator to accept the evidence tendered on this point at the hearing. Evidence at a hearing can consist of documents or oral testimony. It is the function of the Adjudicator to admit and sort out the reliability of the evidence tendered, as this Adjudicator did.

We note that generally the investigation made by a Director's delegate can range in detail and quality. Normally, the information taken by the Director's delegate is not taken under oath, and the Employer has no right to challenge or cross-examine the Employee at the stage of an investigation, prior to the making of a Determination. Once a Determination is made the Employer does have that right, before this Tribunal, to test and challenge the information presented under oath or affirmation. If the non-attendance of a successful party to a Determination became common place at oral hearings before this Tribunal and the unsuccessful party did not have the opportunity to challenge the complainant's evidence great mischief could result. It would simply be open to an Employee or Employer to provide fabricated evidence to the Director's delegate.

In the unusual circumstances of this case, the Employer raised an issue of credibility, which went unanswered by the Employee at the hearing. We do not find that there was any reviewable error on the part of the Adjudicator in relying upon the viva voce evidence of the Employer, which did not differ substantially from information provided to the Director's delegate at the time of the initial investigation.

ORDER

Pursuant to Section 116 of the Act, we confirm the Original Decision BC EST #D448/97.

Paul Love
Adjudicator
Employment Standards Tribunal

Alfred Kempf
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal