

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an application for reconsideration pursuant to Section 116 of the  
*Employment Standards Act*, R.S.B.C. 1996, c. 113

-by-

Diane Schultz  
("Schultz")

-of a Decision issued by-

The Employment Standards Tribunal  
(the "Tribunal")

**ADJUDICATOR:** Kenneth Wm. Thornicroft  
**FILE No.:** 99/172  
**DATE OF DECISION:** July 7th, 1999

**BC EST #D253/99**  
**Reconsideration of BC EST #D107/99**

**DECISION**

**OVERVIEW**

This is an application filed by Diane Schultz (“Schultz”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of an adjudicator’s decision to vary a determination that was issued by a delegate of the Director of Employment Standards on October 30th, 1998 under file number 029-343 (the “*Determination*”).

The Director’s delegate held that Roma Ribs Limited operating as Tony Roma’s (“Tony Roma’s” or the “employer”) owed its former employee, namely, Ms. Schultz, the sum of \$3,176.91 on account of 8 weeks’ wages as compensation for length of service (see section 63 of the *Act*) and concomitant vacation pay and interest.

Tony Roma’s appealed the *Determination* to the Tribunal arguing that it was not obliged to pay Schultz any termination pay because she quit [see section 63(3)(c) of the *Act*]. The employer’s appeal was heard on February 19th, 1999 and in a written decision issued on March 12th, 1999, the adjudicator confirmed the delegate’s finding that the employer terminated Schultz’s employment without just cause. However, the *Determination* was varied because the delegate awarded Schultz termination pay based on 8 years of completed service whereas the adjudicator found that Schultz had only 7 consecutive years’ service at the point of termination; further, her average weekly hours worked during the 8-week period prior to termination was 34.6 rather than the 40-hour average utilized by the delegate. Thus, the *Determination* in favour of Schultz was reduced, after the appropriate vacation pay adjustment, to \$2,374.56 plus interest.

**THE REQUEST FOR RECONSIDERATION**

Schultz’s request for reconsideration is contained in a letter to the Tribunal dated March 15th, 1999. Schultz asserts that she was employed for over 8 consecutive years with Tony Roma’s and, therefore, was entitled to 8, rather than 7, weeks’ wages as compensation for length of service. Schultz does not contest the adjudicator’s finding that she averaged 34.6 working hours per week in the 8-week period prior to her termination [see section 63(4)] rather than, as determined by the delegate, 40 working hours.

**ANALYSIS**

The delegate, at page 3 of the *Determination*, found that Schultz “had been an employee of Roma’s for nine years”. The adjudicator noted, at page 2 of his decision, that “Mrs. Schultz was employed by [Tony Roma’s] for almost eight years”. Clearly, these two findings are inconsistent.

In my view, the best evidence as to Schultz’s consecutive years of service is contained in the Record of Employment (“ROE”) that was issued to Schultz by Tony Roma’s on September 2nd, 1998 and which states that her “first day worked” was October 12th, 1989. This ROE was before

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the delegate--it is referred to in the Determination at page 3--and was also contained in the materials that were provided to the adjudicator prior to the appeal hearing.

Although requested to do so, the employer has not filed any submission with respect to Schultz's reconsideration request and thus I assume it does not take issue with her position regarding her consecutive years of employment.

In light of the above, and based on the employer's own record (the ROE), it appears clear that the adjudicator erred in finding that Schultz had completed only 7 consecutive years of employment when she was terminated on August 24th, 1998; in fact, as she asserts, Schultz had completed nearly 9 years. Thus, Schultz is entitled to 8 weeks' wages as compensation for length of service together with concomitant vacation pay and interest. I have calculated Ms. Schultz's entitlement as follows:

34.6 hours/week x \$9.25 per hour	= \$ 320.05 per week
\$320.05 per week x 8 weeks	= \$2,560.40
Vacation pay (6%)	= <u>\$ 153.62</u>
Total	= <u>\$2,714.02</u>

together with interest to be calculated in accordance with section 88 of the *Act*.

**ORDER**

The Determination is varied so that the original "Order" issued by the adjudicator now reads as follows:

**Order**

In accordance with section 115 of the *Employment Standards Act*, the delegate's Determination is varied. The Company [Tony Roma's] owes Mrs. Schultz **\$2,714.02** together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

The application to vary the decision of the adjudicator in this matter is allowed as noted above.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**