BC EST #D259/99
Reconsideration of BC EST #D107/99

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-

Roma Ribs Limited operating as Tony Roma's

("Tony Roma's" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/205
DATE OF DECISION:	July 7th, 1999

DECISION

OVERVIEW

This is an application filed by Roma Ribs Limited operating as Tony Roma's ("Tony Roma's" or the "employer") 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 Tony Roma's owed its former employee, Diane Schultz ("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 Schultz had only 7 consecutive years' service at the point of termination; further, her average weekly hours 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 plus interest.

The employer's request for reconsideration is contained in letter to the Tribunal dated April 8th, 1999 and sets out, in essence, two grounds for reconsideration. First, the employer complains that since the delegate did not attend the appeal hearing, the employer was denied an opportunity to cross-examine the delegate regarding her "investigative process". Second, the employer asserts that the adjudicator erred in finding that Schultz did not quit.

ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the *Act* (the "reconsideration" provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

With the foregoing comments in mind, it is clear that the second ground advanced in support of the reconsideration request is without merit. The employer simply wishes to revisit (and have overturned) the adjudicator's findings of fact. The adjudicator made certain findings of fact and there was more than a sufficient evidentiary basis for such findings. Based on those findings, it cannot be said that Schultz quit her employment.

As for the first ground for reconsideration, clearly, the employer was afforded the opportunity to respond to the complaint as mandated by section 77 of the *Act*. I might note that this issue was never raised in the employer's original appeal documents and appears to have been raised for the first time on reconsideration. In any event, if the employer wished to cross-examine the delegate it ought to have requested that the delegate be summoned to the hearing [see section 109(1)(g)], but even if the employer had done so, I am of the view that the employer's proposed cross-examination of the delegate would have been, at best, of only marginal relevance.

Even if the delegate had attended the hearing, she would only be subject to cross-examination if she chose to give evidence, an unlikely scenario. The dispute between the parties centers on the events of August 24th, 1998 (Schultz's last day of work) and the delegate was not in a position to provide any probative evidence with respect to those events and thus it is hardly surprising that she chose not to attend the hearing. At the appeal hearing, the employer was given a fresh opportunity to prove, through its own witnesses and through cross-examination of Schultz and her witness, that Schultz had, in fact, quit her employment. In this case, the employer manifestly failed to prove that latter allegation.

ORDER

The employer's application to cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal