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 -

CDJ Enterprises Ltd. operating as Chillanos Restaurant and Bar
(" CDJ ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: C. L. Roberts

FILE No: 2000/471

DATE OF DECISION: September 11, 2000

DECISION

This is a decision based on written submissions by Rod McLeod, Solicitor for CDJ Enterprises Ltd. operating as Chillanos Restaurant and Bar ("CDJ"), Ed Wall on behalf of the Director of Employment Standards (the"Director"), and Paul C. Neumann ("Neumann") on his own behalf.

OVERVIEW

This is an application by CDJ, pursuant to Section 116(2) of the *Employment Standards Act* ("the *Act*"), for a reconsideration of Decision #BC EST #D205/00 (the "Original Decision") which was issued by the Tribunal on May 17, 2000.

The Original Decision confirmed a Determination made by a delegate of the Director on March 10, 2000. The Director's delegate found that Neumann was an employee, rather than a manager, as defined in the *Act*, and that CDJ was liable to Neumann for overtime pay in the amount of $1,771.72 and interest.

The reconsideration request is with respect only to that portion of the Original Decision that relates to the quantum of overtime pay.

ISSUE TO BE DECIDED

Whether the Tribunal erred in confirming the delegate's decision to accept Neumann's hours over those of CDJ.

FACTS

Neumann was employed as a chef at Chillanos Restaurant and Bar operated by CDJ. Because CDJ was of the belief that Neumann was a manager, it did not keep proper payroll records of his daily hours of work until Neumann filed his complaint. CDJ recorded only the kitchen shift schedules, and, in Neumann's case, only whether he was on shift or off shift. The specific hours of all remaining employees were recorded. When CDJ was questioned about Neumann's hours of work, it revised the schedules by writing in the estimated daily hours worked based on when the kitchen closed and which other employees worked the same shifts, on the face of the schedules.

Neumann provided the Director's delegate with his own records that he indicated were updated on a daily basis.

In the absence of properly maintained payroll records, the Director's delegate preferred Neumann's evidence to that of CDJ, in light of the fact that CDJ had, by its own admission, compiled, from memory, an approximation of Neumann's hours of work only after the complaint was filed. After reviewing the purposes of the *Act*, and in particular, section 2 (a), the delegate stated that, by not keeping records, "the employer in this instance, has, albeit unintentionally,

made it impossible for the Director of Employment Standards to achieve the primary purpose of the *Act*".

The determination was appealed on March 28, 2000. The grounds of appeal, as noted above, were the delegate's finding on the issue of whether Neumann was a manager, and, if he was not, whether the delegate erred in accepting Neumann's personal daily work records over the employer's schedules as proof of hours worked. The Original Decision found the delegate had not erred.

ARGUMENT

CDJ seeks a reconsideration of the Original Decision on the grounds, as I understand it, that the Tribunal erred in rejecting CDJ's reconstruction of the schedule as refuting Neumann's personal records. In particular, CDJ takes issue with the following portion of the Original Decision:

> In situations such as the present case the delegate may accept the employee's records as being the best evidence where the employer cannot produce proper payroll records or other substantial evidence to refute the employee's own records." (CDJ's emphasis)

CDJ outlines specific examples of where CDJ's records refute Neumann's records, and seeks a reconsideration of the decision "in light of the foregoing comments and substitute a decision that is fair for both the employee and the employer as mandated by the *Act*". (emphasis in original) Mr. McLeod argues that the Tribunal failed to properly consider the "purposes of the *Act*, and in particular, the fair treatment of both employer and employee (s. 2(b)) and fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*."(emphasis in original)

The Director's delegate seeks to have the request for reconsideration denied on the grounds, in essence, that CDJ was represented by counsel at the appeal, and that the issues were, or ought to have been raised at that time. He argues that CDJ has had several opportunities to present its arguments, and that it not have another opportunity to retry the case.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (see *Milan Holdings Ltd*. BC EST #D313/98). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. (*Milan Holdings*, p. 7)

The scope of review on reconsideration is a narrow one (see *Zoltan Kiss* BC EST #D122/96): 1. failure by the adjudicator to comply with the principles of natural justice, 2. mistake in stating the facts, 3. failure to be consistent with other decisions which are not distinguishable on the facts, 4. significant and serious new evidence that would have led the adjudicator to a different decision, 5. misunderstanding or a failure to deal with a significant issue in appeal, and 6. a clerical error in the decision.

None of these grounds were advanced in the reconsideration request. Further, there is nothing in the record that substantiates any of these grounds. The request for reconsideration summarizes the arguments made to the Tribunal, and argues that the Original Decision is unfair to CDJ.

CDJ was represented by counsel on appeal. One of the grounds of appeal was the issue of proof of hours of work. That was addressed by both the delegate and the adjudicator. There is no suggestion that there was an error of law or an inconsistency with other decisions. In fact, the adjudicator referred to a number of cases decided by the Tribunal in which the employee's records were found to be the best evidence where the employer could not produce proper payroll records or other evidence to refute the employee's own records.

The reasons advanced by CDJ in support of its request, are, in essence, an attempt to have the Tribunal "re-weigh" the evidence. That is not a basis upon which the reconsideration power will be exercised.

Nor, in my view, are there are any questions of law, fact, principle or procedure so significant that they should be reviewed because of their importance to the parties, or for their implications for future cases.

ORDER

The application for reconsideration is dismissed.

C. L. Roberts
Adjudicator
Employment Standards Tribunal