EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Galter Holdings Ltd.
("Galter Holdings" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 1999/616

DATE OF HEARING: January 21, 2000

DATE OF DECISION: February 10, 2000

DECISION

SUBMISSIONS:

Mr. Alex Laverick	on behalf of the Employer
Mr. Philip Brent	on behalf of himself
Mr. Dave McKinnon	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on September 16, 1999 which determined that Philip Brent was owed $1,829.85 from his employment with the Employer.

Galter Holdings operates a transmission repair service on Imperial Street in Burnaby. According to the Determination, Brent was employed there between May 14, 1999 and June 1, 1999. In the course of his investigation, the delegate spoke with Alex Laverick, the operator of the business, and learned from him that Brent had been employed between May 14 and 17, when the business burned. The payroll records were not available due to the fire. According to the Determination, and Brent's attached affidavit, Brent stated that he was "employed" by the Employer between May 14 and June 1, 1999, except for May 15, 23, 24 and 30, at the rate of $8.00 per hour until May 17, and $15.00 thereafter. Brent stated in the affidavit that the hours of work each day was 9:00 a.m. to 6:00 p.m. with a one half hour eating period. On June 1, the hours of work were 9:00 a.m. to 3:00 p.m. Brent stated that he had received $250 in cash as payment for the time worked. Given the contrasting positions on the facts, the delegate convened a fact finding conference which Laverick did not attend.

The Employer appeals the Determination.

FACTS AND ANALYSIS

A hearing was held at the Tribunal's offices in Vancouver on January 21, 2000. Brent participated via conference call.

It is perhaps an understatement to say that Laverick was upset with the delegate, the Tribunal and just about anyone who had dealt with this matter. He indicated from the beginning that he was "participating under duress". It is fair to say that he expressed serious reservations about the fairness of the hearing.

After the hearing had been under ways for some time, I noticed a small tape recording device on the table in front of Laverick. I asked Laverick about it and he indicated that he had been recording the proceedings before me. I gave the matter some thought and expressed concern that the recording had occurred surreptitiously and that prior consent had not been requested. I subsequently requested submissions form the parties with respect to the recording. The reason

expressed by Laverick for recording the proceedings were, essentially, two-fold, first, to have a record of the hearing--for, I assume, further proceedings elsewhere--and, second, as an "aide-memoire". Laverick stated that he was prepared to have copies or transcripts made of the tape for use by the other parties.

Having considered the submissions carefully, I decided that I was not prepared to allow Laverick to record the hearing. I start from the premise that the Tribunal has the authority to "conduct an appeal ... in the manner it considers necessary" (Section 107). I find the following quote from a decision of the British Columbia Labour Relations Board instructive with respect to the Tribunal's discretion in the conduct of its hearings (*Harrison Block and B.C.G.E.U.*, BCLB No. 171/84, reconsideration of No. 49/84 (at page 2, QL):

> "A party appearing before the Labour Relations Board is entitled to be dealt with according to the rules of natural justice. As stated by Robert F. Reid and David Hillel in *Adminstrative Law and Practice,* Second Edition, Toronto, 1978:
>
> > "Natural justice is a simple concept that may be defined completely in simple terms: natural justice is fair play, nothing more."
> > (at 213)
>
> The basic criteria of a fair hearing include, among other things, the right to notice, the right to an adjournment in appropriate circumstances, the right to call evidence, and the right to respond to the evidence and submissions of other parties."

In that case a reconsideration panel of the British Columbia Labour Relations Board upheld a decision to deny a party permission to tape-record the proceedings. This remains the practice at the Labour Relations Board (*Haebler Construction Ltd. and United Brotherhood of Carpenters and Joiners,* BCLRB No. B52/93). The Canada Labour Relations Board (now the Canada Industrial Relations Board) has similarly refused to allow recording by the parties *(Canadian Merchant Service Guild and Canadian Pacific Limited*, <1980> 3 Can LRBR 87 (CLRB). The Ontario Labour Relations Board have permitted tape recording in limited circumstances as an "aide-memoire" where it does not interfere with the proceedings. As well, it is clear that the recording is not the official record. A decision to deny permission to record proceedings as a matter of policy does not constitute a breach of the principles of natural justice (see, for example, *Eastern Provincial Airways Limited v. The Canada Labour Relations Board et al.*, Action No. A-783-83 (Federal Court of Appeal), and *Alberta Labour Relations Board v. IBEW local 1007 et al.*, <1991> Alta LR (QB).

While different administrative tribunals have different practices with respect to the recording of proceedings by parties, in my opinion, except in exceptional circumstances, the Tribunal ought not to permit its proceedings to be recorded. I have several concerns with respect to such recording, apart from the particular concern in this case that the recording occurred surreptitiously and without a prior application. I would like to add that I do not believe that the Employer had any improper motive in recording as it did. Nevertheless, first, in my view, the presence of recording devices tend to promote a "formal" atmosphere which may be intimidating to witnesses and others. As well, I am concerned about the potential proliferation of recording devices in the Tribunal's hearings. Second, it is clear that the recording, or transcript of the

recording, is not the official record of the proceeding. Given "human fallibility", as well as the technical and practical problems associated with recording, concerns almost inevitably arise as to whether the recording is "selective" which, in turn, lead to disputes over the veracity and accuracy of the recording in question, or the relative veracity or accuracy of "competing" recordings made by different parties (obviously, that is a particular concern where the recording is not done by an official reporter). Even if a party is agreeable to providing the recording or a transcript to the other parties, those concerns are not alleviated. Third, given that the recording is not the official record, there is--in my opinion--little practical reason for recording the proceedings. While I appreciate the Employer's concern for keeping an accurate records of the proceedings, that concern does not outweigh the problems associated with recording.

In this case, essentially a simple dispute over whether Brent worked (or not) during a relatively brief period of time, I was not satisfied that there was any reason to permit tape-recording. In the result, I ordered that Laverick stop recording and that the tape be turned over to the Tribunal pending such application as Laverick might make to have the tape released. When he refused to comply with the order, I terminated the hearing. In my view, the Employer acted improperly when it recorded the proceedings surreptitiously and without prior consent. Moreover, the Employer acted improperly when it refused to comply with my order that it stop the recording. By refusing to comply with the order, the Employer made it impossible to continue the hearing. In the circumstances, the proper course of action for the Employer would have been to comply and subsequently appeal my decision not to permit recording. In refusing to comply the Employer interfered with the Tribunal's ability to "conduct an appeal ... in the manner it considers necessary" (Section 107).

Laverick and Ingrid Yuille (Laverick's wife and the Employer's president) testified for the Employer at the hearing. Briefly, the evidence presented on behalf of the Employer was that:

- Brent lied in his affidavit. He did not work the days claimed. Laverick testified that on May 15 and 16, 1999, he was in a car race in Mission (and not at the shop) and that May 16 was a Sunday when the shop was closed in any event. Brent did not work that day.

- Laverick explained that that Brent's hourly rate was $8.00, not $15.00 (from May 17, as stated in Brent's affidavit.

- In cross examination by the delegate, Laverick explained that Brent worked for him on May 14, from 9:00 a.m. to 6:00 p.m., with one hour off for lunch. He worked the same hours on May 17. He was present at the work place for "about three hours" on May 18. He appeared at the work place on June 1 and Laverick asked him to work on a truck. At that time, he worked three hours "at most".

- The shop is never open on Sundays.

- On May 17, the shop burned and did not open until May 26. There was extensive damage to the business and it was not operating. At the hearing, Laverick produced consecutively numbered invoices to show that the Employer did not invoice clients between May 13 and June 5, 1999. In the result, Brent did not work.

- Lunch break is always one hour.

- Laverick explained that he went to the shop on July 19, was "distraught" and did not go back for a week. He was back at the shop on July 25. He says he never spoke with the delegate on July 27, 1999, as claimed by the delegate according to *Galter Holdings Ltd*, BCEST #D534/99 (dealing with the question of whether the Employer ought to be given an extension of the time to file an appeal). Yuille testified that they do not have an answering machine and the delegate did not leave messages. As I understood Laverick's evidence, the Employer never received notice of the fact finding conference.

It was not in dispute that Brent had been paid $250 in cash.

The evidence presented by the Employer raised serious questions in my mind--which may well have been resolved by the hearing--for example: how could Brent be working when the shop was closed due to fire after May 17 or 18 (if, indeed, that was the case)? What work was he doing for 8.5 hours per day if the shop had been destroyed by fire (if that was the case)? What were the hours of work? What was the rate of pay? Did the Employer receive notice of the fact finding conference (when the notice was sent to the "wrong" address, *i.e.*, the business address) through telephone messages and otherwise? However, these questions cannot be resolved without an assessment of the credibility of the witnesses. As the hearing was interrupted, Brent did not have the opportunity to give evidence. It was clear that he disagreed with the Employer's allegations of fact. Similarly, the delegate did not have the opportunity to give evidence with respect to his conversations (and messages left) with the Employer concerning the fact finding conference and to fully cross examine Yuille and Laverick on those matters.

The appeal turns on questions of fact. The burden to show that the Determination is wrong rests with the appellant Employer. In the circumstances, I have reluctantly decided that the appeal must be dismissed. Nevertheless, to do otherwise would be to allow the appellant Employer to short circuit the hearing process and would, in effect, deny the respondent Employee a fair hearing.

ORDER

The Determination dated September 16, 1999 is confirmed.

IB S. PETERSEN

Ib S. Petersen
Adjudicator
Employment Standards Tribunal