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 -

Geoffrey Guy Phillips
(" Phillips ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/674

DATE OF DECISION: January 14, 2000

DECISION

OVERVIEW

This is an application filed by Geoffrey Guy Phillips ("Phillips") pursuant to section 116 of the Employment Standards Act (the "Act") for reconsideration of a Tribunal decision issued on September 2nd, 1999 under EST Decision No. D352/99.

By way of a Determination issued by a delegate of the Director of Employment Standards on April 27th, 1999 (the "Determination") Phillips' unpaid wage complaint was dismissed as being "vexatious" [see section 76(2)(c) of the Act]. I should add that the delegate, in the Determination, also referred to (and incorporated by reference) an earlier letter to Phillips, dated April 14th, 1999, in which the delegate indicated, inter alia, "it would seem that you were not an employee of [the alleged employer] and this branch has no jurisdiction to handle your complaint as an employee".

Phillips appealed the Determination to the Tribunal. The Tribunal adjudicator held that Phillips "was not an employee within the meaning of the Act" and accordingly varied the Determination so that, in effect, Phillips' complaint was dismissed pursuant to section 76(2)(b)--"this Act does not apply to the complaint"--rather than pursuant to section 76(2)(c)--"the complaint is...vexatious".

GROUNDS FOR RECONSIDERATION

Phillips' request for reconsideration of the adjudicator's decision is contained in a written submission, dated November 5th, 1999, and filed with the Tribunal on November 9th, 1999. Phillips' main complaint appears to be that the Tribunal adjudicator rendered a decision in the matter without holding an oral hearing. In his November 5th letter Phillips also makes some rather vague (and certainly wholly unsubstantiated) allegations regarding the conduct of the adjudicator. I do not intend to make any further comment regarding these latter allegations.

ANALYSIS

Following receipt of the adjudicator's decision, Phillips filed a complaint with the provincial Ombudsman who, in turn, dismissed the complaint in accordance with the provisions of section 13(c) of the Ombudsman Act--which provides that a complaint may be dismissed if the complainant has not availed him or herself of an adequate alternative remedy. The Ombudsman directed Phillips to make the present application for reconsideration.

As noted, Phillips' chief complaint is that the appeal was adjudicated on the basis of the parties' written submissions and without viva voce evidence. It should be observed that Phillips did not object to the appeal proceeding in this fashion until after the adjudicator's (adverse to Phillips)

decision was in hand. Indeed, in his original letter of complaint to the Ombudsman, Phillips indicated that when he learned that the appeal was to proceed solely on the basis of the parties' written submissions "I thought given the strength of my case and the inconsistencies in my former employer's case that this was a good sign". I can only infer from this latter statement that Phillips is not so much concerned about the fact that the adjudicator did not hold an oral hearing as he is concerned about the fact that the adjudicator dismissed his appeal. Of course, Phillips is hardly the first litigant to complain about process issues only after having lost a case on its merits.

Section 107 of the Act states that "the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing". Concurrent with the adjudicator advising the parties that there would not be an oral hearing, both parties were also invited to make final written submissions. Both parties availed themselves of that opportunity. I am not satisfied that the adjudicator's decision to proceed solely on the basis of written submissions prejudiced either party and Phillips, for his part, has not indicated how or in what fashion he was prejudiced by the appeal procedures followed in this case.

The issue before the adjudicator was essentially a question of mixed fact and law, namely: Was Phillips an employee? However, in this instance, there was no disagreement between the parties regarding the central facts upon which the adjudicator's decision was founded, and in my view, the adjudicator appears to have applied the relevant governing legal principles. The adjudicator concluded, as noted above, that the relationship between the parties was not an employment relationship. In coming to that conclusion, the adjudicator noted, among other things, that Phillips dealt with the alleged employer through an incorporated entity (a former franchisee of the alleged employer) that he controlled. Phillips himself was not a party to the key contract between the parties. Monies were paid by the alleged employer directly to the corporate entity; these latter monies included an amount to cover the G.S.T. which, as noted by the adjudicator, suggests a commercial relationship. The pattern of payments also suggests that the corporation controlled by Phillips faced a risk of loss and a concomitant opportunity to profit, each of which is inconsistent with an employment relationship. I am of the view, based on the reasons set out in the adjudicator's decision, that the relationship between the parties was not an employment relationship.

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.

In my view it was appropriate for the adjudicator to proceed without an oral hearing. There is no new evidence before me. I do not conceive that the adjudicator erred in law. In his reconsideration request, Phillips states that:

> "My appeal is simple. I would like my hearing. The very hearing I spent hours preparing for and earned. I do not want any reconsideration of the decision as it stands. I would ask you to please reopen my case and set a hearing date."

Phillips has already had his hearing--albeit not an oral hearing. The only authority I may exercise is set out in section 116 which requires me to "reconsider the decision as it stands" and, as it stands, I see no reason whatsoever to vary or cancel the adjudicator's decision.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal