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 -

Early Bird Awards Inc.
("Early Bird" or the "employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/137

DATE OF DECISION: June 27, 2000

DECISION

OVERVIEW

This is an application filed by Early Bird Awards Inc., a.k.a. Earlybirds Awards Inc. ("Early Bird" or the "employer"), pursuant to section 116 of the *Employment Standards Act* (the "Act") for reconsideration of an adjudicator's decision. The adjudicator's decision (BC EST Decision No. D068/00 as corrected by D068b/00) confirmed a Determination that was issued by the Director of Employment Standards on September 28th, 1999 under file number ER 63-542 (the "Determination").

THE DETERMINATION

Early Bird apparently operated a "900" telephone "psychic consultation" service under the firm name "Evanly-rays". The six complainants—who were initially characterized and paid by Early Bird as if they were independent contractors—were styled as "psychic consultants" and they offered "psychic" consultations or "readings" over the telephone to the callers and were paid on a commission basis.

The employer's principal submission to the Director's delegate was that the six complainants were independent contractors and thus not entitled to file complaints under the *Act*—the delegate rejected that argument and found that all six complainants were "employees" as defined in section 1 of the *Act*. I might add that Revenue Canada also concluded, in 1998, that these individuals were not independent contractors. The delegate then proceeded to calculate the employer's unpaid wage liability—primarily relating to overtime and statutory holiday pay—based on the employees' commission earnings (thus rejecting the employer's position that overtime and statutory holiday pay ought to have been calculated based on the minimum wage).

In the end result, Early Bird was ordered to pay the sum of $13,554.23 on account of unpaid wages and interest owed to six former employees, namely, Michael Austin a.k.a. Michael Alexander ($56.70), Jesai Chantler ($3,910.24), Anne Flanagan ($3,027.36), Faith Horne ($2,828.10), Andrea Vollans ($1,000.00), Dora Weninger ($2,731.83).

THE ADJUDICATOR'S DECISION ON APPEAL

Early Bird appealed the Determination to the Tribunal and the appeal was heard in Kelowna, B.C. on December 20th, 1999. The employer advanced essentially the same arguments on appeal that it raised during the delegate's investigation.

The adjudicator, in a decision issued on February 18th, 2000 (BC EST Decision No. D068/00), confirmed the Determination. The adjudicator found that the delegate correctly concluded that the complainants were employees. Further, given that Early Bird "…did not produce any evidence that the Director had erroneously calculated the wages, overtime and vacation pay

amounts due to the [complainants]", the respective amounts awarded to each of the six complainants were confirmed.

THE REQUEST FOR RECONSIDERATION

As noted at the outset of these reasons, Early Bird now seeks a reconsideration of the adjudicator's decision confirming the Determination. The reconsideration request is contained in a letter to the Tribunal dated March 1st, 2000. I have also reviewed the employer's April 10th, 2000 submission to the Tribunal. In its March 1st letter, the employer asserts:

- "I also feel strongly that the Adjudicator was bias [sic] towards us and had already predetermined this decision, as do others as well";
- "…the Adjudicator [did not] comply with the principals [sic] of natural justice";
- the adjudicator's decision is not "consistent with other decisions which are not distinguishable on the facts" and displays "serious mistakes in applying the law";
- "Some significant and serious new evidence has become available that would have led to the Adjudicator to a different conclusion [sic]";
- the adjudicator failed "to deal with a significant issue in the appeal".

The employer also appears to be disputing the adjudicator's (and delegate's) conclusion that the complainants were employees and not independent contractors

I might add that, for the most part, the foregoing allegations are simply that—*allegations* that are wholly unsupported by any *evidence*.

ANALYSIS

There is not a shred of evidence to support employer's suggestion that the adjudicator was biased or otherwise compromised the principles of natural justice. The mere fact that one disagrees with an adjudicator's decision does not, of itself, prove—or even suggest—bias. There is nothing in the material before me which shows that the adjudicator had a pecuniary interest in the outcome of the appeal, was related in some fashion to any of the parties, or that the adjudicator, by word or deed, suggested that she was predisposed against the employer.

The employer was given every reasonable opportunity to present its case. It lost its appeal. The employer feels it ought not to have lost. That is not enough to succeed on a reconsideration application. In my view, the adjudicator correctly instructed herself on the relevant legal principles and appropriately applied those principles to the facts as she found them. I might add

that, based on my review on the material before her, the adjudicator's findings of fact, although clearly not accepted by the employer, were all supported by a proper evidentiary foundation.

I do not conceive that the adjudicator's decision is inconsistent with established Tribunal jurisprudence and the employer has not indicated in what particular manner the decision is inconsistent. The employer does say that "bonuses" were inappropriately included when determining the employee's "regular wages" for purposes of calculating overtime and statutory holiday pay—there is no evidence before me to support this assertion.

The employer also says that it now has the right to assert some sort of "chargeback claim" against the employees' commission earnings pursuant to the employees' contracts—a claim, it might be noted, that was never purportedly exercised during the employees' tenure. Without commenting in any detailed way on the seemingly dubious merits of this "chargeback" claim (it seems to run afoul of sections 21 and 22 of the *Act*), I will only observe that any such claim must now be pursued in the civil courts.

The employer has not presented any material "new evidence" (or, indeed any new evidence at all) and, by way of final comment, it appears to me that the adjudicator dealt with all of the issues raised by the appeal and appropriately disposed of those issues.

ORDER

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

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal