Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Devin Herbert ("Herbert")

- and by -

The Director of Employment Standards (the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft, Panel Chair
David B. Stevenson
Alison Narod

FILE No.: 2003/31 & 2003/36

DATE OF DECISION: September 15, 2003

DECISION

INTRODUCTION

We have before us two separate applications for reconsideration filed pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). Each application concerns B.C.E.S.T. Decision No. D136/03 issued by Adjudicator Taylor on April 23rd, 2003. Adjudicator Taylor cancelled a Determination that was issued by a delegate of the Director of Employment Standards on July 22nd, 2002 (the "Determination"). By way of the Determination, Karla Phillips, carrying on business as "Student Works Painting" ("Phillips"), was ordered to pay a total sum of $3,240.50 to four former employees on account of unpaid wages and section 88 interest.

The first application for reconsideration (EST File No. 2003/031) was filed on May 8th, 2003 on behalf of one of the four employees, namely, Devin Herbert ("Herbert"). The second application (EST File No. 2003/036) was filed by legal counsel for the Director of Employment Standards on June 16th, 2003. Both applications are timely.

There is an extensive record in this matter and, accordingly, we propose to summarize that record prior to addressing the two reconsideration requests.

PREVIOUS PROCEEDINGS

The Determination

On July 22nd, 2002 a Director's delegate issued the Determination against Ms. Karla Phillips in the total amount of $3,240.50 on account of unpaid wages owed to four former employees including Mr. Herbert. During the delegate's investigation, Ms. Phillips, who entered into an agreement to operate a "Student Works Painting" franchise, argued that she was not the "true employer" of the four complainants and, in any event, was not bound by the franchise agreement since she was an infant (18 years of age) when that agreement was executed. The franchisor under Ms. Phillips' agreement was 3717 Investments Ltd. (the "franchisor").

The delegate concluded--relying on two previous Tribunal decisions involving the very same franchisor, *3717 Investments Ltd.*, B.C.E.S.T. Decision No. D337/98 and *Robyn Bourgeois Painting*, B.C.E.S.T. Decision No. D466/01--that Ms. Phillips was the only employer of the complainants. The delegate held that the franchisor was neither the "true employer" of the complainants nor was it an "associated corporation" (with Ms. Phillips) under section 95 of the *Act*. With respect to these latter two matters, the delegate stated (Determination, at pp. 4-5):

> I have investigated the question of whether [the franchisor] was either the employer of [the complainants] by virtue of being the employer of Karla Phillips. I find that the facts are similar, if not identical, to the facts described in the Tribunal's decision #D337/98. I am not prepared, therefore, to make a finding that is contrary to decision #D337/98.
>
> I have also investigated the question of whether [the franchisor] and Karla Phillips are associated pursuant to Section 95 of the Act. Again, I find the facts are similar, if not identical, to the facts

> described in the Tribunal's decision #D466/01. I am not prepared, therefore, to make a finding that is contrary to decision #D466/01.
>
> Karla Phillips hired the employees, set their rate of pay, and directed their work.
>
> • I find that Karla Phillips was the employer of [the complainants].

The legal significance of Ms. Phillips' infancy was (perhaps inadvertently) not addressed by the delegate in the Determination.

The appeal and the adjudicator's first decision [B.C.E.S.T. Decision No. D550/02]

Ms. Phillips appealed the Determination on the grounds that she was not the true employer and that she could not be held liable for any unpaid wages by reason of her infancy.

Adjudicator Taylor issued a decision on December 17th, 2002 (B.C.E.S.T. Decision No. D550/02) confirming the Determination as it related to the "true employer" question. The adjudicator rejected Ms. Phillips' submission that she was an employee (employed by the franchisor) rather than the employer of the four complainants (at p. 7):

> I have carefully reviewed the facts and arguments presented in this case as compared to the facts in the two previous Tribunal decisions on [the franchisor's] franchises. I agree with the Director that the facts of those cases do not differ in any substantial way from the facts in this case. I have carefully reviewed the reasoning in the two previous Tribunal decisions and concur in their results. Accordingly, I find that the Director did not err in this case in applying those decisions to arrive at the Determination that Phillips entered into a franchise agreement with [the franchisor] and that Phillips, not [the franchisor], was the employer of these four employees.
>
> On the facts, I find that Phillips was not an employee of [the franchisor] and that she hired the four employees. I find that Phillips has not substantiated this part of the appeal and, accordingly, I order that this aspect of the appeal is dismissed.

However, the relevance and legal effect of Ms. Phillips' infancy was referred back to the Director for further investigation. In particular, the adjudicator directed the delegate to consider section 19 of the *Infants Act:*

> **When infants' contract unenforceable**
>
> 19. (1) Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is
>
> (a) a contract specified under another enactment to be enforceable against an infant,
>
> (b) affirmed by the infant on his or her reaching the age of majority,
>
> (c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or
>
> (d) not repudiated by the infant within one year after his or her attaining the age of majority.
>
> (2) A contract that is unenforceable against an infant under subsection (1) is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.

The relevant portions of the adjudicator's reasons (at pp. 7-8) with respect to the possible legal ramifications of the *Infants Act* are reproduced below:

> Phillips' argument under the *Infants Act* has been directed to her contract with [the franchisor]. She submitted that the contract is void. That may not be a correct interpretation of s. 19. Section 19 speaks in terms of enforceability. It is not clear to me that this case raises any enforcement issues *vis-à-vis* [the franchisor]. The issue seems to me to be enforcement of the contract between Phillips and the employees. The Director suggests that [the] issue is not 'enforcement' but statutory obligations. Arguably, however, those statutory obligations arise in contract and the issue may still come back to enforcement...
>
> In rendering the Determination, the Director did not, apparently, consider the submissions on the effect of Phillips' age. In my view, that amounts to an error of law. This is an issue that needs analysis, based on the provisions of the *Infants Act* and the *Employment Standards Act* and the facts of this case. If s. 19 applies to employment contracts, the provisions of s. 20, or other sections, may be applicable, in which case there would be a need for further fact finding. I find that this is an appropriate case to refer back to the Director for further investigation.

The Further Investigation

The Director's further investigation resulted in a report to the Tribunal dated February 7th, 2003 (this submission was not prepared by the delegate who issued the original Determination). The Director's delegate concluded that an employment contract is governed by the provisions of the *Infants Act* and that none of subsections 19(1)(a), (b), (c) or (d) of the *Infants Act* applied in the case at hand. The delegate then concluded that since the franchisor indirectly obtained a financial benefit from the work of the four complainants it "was, at least indirectly, the employer of the painters in these particular factual circumstances, despite what the two previous Tribunal decisions state".

The delegate's February 7th report continues:

> Karla Phillips could not have been the employer because, as a minor, she could not enter into valid contracts to employ the complainants. The Director concludes that [the franchisor] was the employer of the complainants and is responsible for the amount of the unpaid wages for each of the four painters...
>
> In conclusion, the Director is of the opinion that [the franchisor] was the employer of the complainants and is responsible for the amount of the unpaid wages for each of the four painters.

The adjudicator's second decision

The delegate's February 7th decision was provided to the parties for their review and comment. The only party who responded to the delegate's report was the franchisor (who had been provided with a copy of the delegate's report on the basis that it was an "interested party"). Not surprisingly, the franchisor took the position that it had no liability in the matter whatsoever.

It should be recalled that the franchisor was not held liable under the original Determination. The delegate specifically held (as noted above) that the franchisor was not an "employer" (either alone or in combination with Ms. Phillips) of the complainants. Further, the delegate also held that the franchisor could not be held liable for the complainants' unpaid wages on the basis that it was "associated" under section 95 of the *Act* with Ms. Phillips (the actual employer). Ms. Phillips unsuccessfully appealed the

Determination on these latter points; the adjudicator expressly confirmed the Determination as it related to those issues. Ms. Phillips has never filed an application for reconsideration with respect to the adjudicator's December 17th decision regarding the "true employer" and "associated corporation" issues.

The delegate's February 7th report constituted a complete disavowal of the Director's earlier findings (findings that were subsequently confirmed by the Tribunal) with respect to whether the franchisor could be held liable for the complainants' unpaid wages either as the complainants' employer or as an associated corporation (with Ms. Phillips) under section 95 of the *Act.*

The delegate's February 7th report concluded that Ms. Phillips could not be held liable for the complainants' unpaid wages since, among other things, she was, at all material times, an infant who apparently repudiated (and certainly never affirmed) the employment contracts she entered into with the complainants. This aspect of the report is in accord with the adjudicator's order referring the matter of the application of the *Infants Act* back to the Director for further investigation.

However, the terms of the referral back order simply did not authorize the Director to revisit the original Determination with respect to the *franchisor's* liability. The adjudicator's order did not direct the Director to revisit this latter issue, let alone reverse the Director's earlier decision (confirmed by the Tribunal) that the franchisor was not liable for the complainants' unpaid wages. The delegate's further investigation and report with respect to the franchisor's possible liability was, in our view, undertaken without any jurisdiction to do so. At best, it seems to us, the delegate's February 7th report represents--at least with respect to the franchisor's possible liability--an implied request for reconsideration of the adjudicator's confirmation of the original Determination on this issue.

The adjudicator's decision confirming the Determination insofar as it related to the franchisor's liability, was a final decision. This latter issue was not part of the referral back order which, it will be remembered, was limited to the question of the legal consequences of Ms. Phillips' infancy.

With the delegate's February 7th report in hand, the adjudicator expressed some concern that the issues arising under the *Infants Act* had still not been fully addressed. Nevertheless, and mindful of rendering a final and timely decision, the adjudicator held, based on the entire record before her, that Ms. Phillips could not be held liable for the complainants' unpaid wages under the *Act* (B.C.E.S.T. Decision No. D136/03, at pp. 4-5):

> Clearly, Phillips was a minor when she entered into these contracts and, in the absence of evidence showing that she either affirmed or failed to repudiate the contracts, they are not enforceable against her. She has been staunch in her position that [the franchisor] is the responsible party and that alone could suggest repudiation. In these circumstances, I am going to accept that as conclusive on this aspect of the case...
>
> I Order that the Determination dated July 22, 2002 be cancelled. The effect of this Order is that there is no enforceability through the Employment Standards Act for the wage arrears for the employees.

In light of the fact that the Director was apparently seeking a reversal of its own prior Determination that the franchisor was not liable for the unpaid wages of the complainants, the adjudicator also addressed that issue. As we previously observed, one might characterize this aspect of the delegate's February 7th report as an implied request for reconsideration. It would appear that the adjudicator did, in fact, reconsider this

issue and saw no reason to change her decision on this particular point (B.C.E.S.T. Decision No. D136/03 at pp. 4-5):

> I found [in B.C.E.S.T. Decision No. D550/02] that the Director did not err in determining that Phillips entered into a franchise agreement with [the franchisor] and that Phillips, not [the franchisor] was the employer of these four employees. *Nothing has been presented by the Director or any party that would alter my decision.* I find that the Director's conclusion that [the franchisor] is an employer of the painters is not tenable. (our *italics*)

Having summarized the record of the prior proceedings in this matter, we now turn to the two applications for reconsideration.

HERBERT'S REQUEST FOR RECONSIDERATION

This application, prepared by Mr. Herbert's mother, summarizes a number of background facts but does not set out any proper legal basis for setting aside or otherwise varying Adjudicator Taylor's decision. The essence of this application is summarized in the final sentence: "I believe that [the principal of the corporate franchisor] is morally responsible for the payment of the four painters, and I would ask the Tribunal to reconsider this case on behalf of my son...and his colleagues...".

While we do not doubt that Ms. Herbert's son (and probably Ms. Herbert herself) is frustrated and perhaps somewhat uncomprehending as to why Devin Herbert's claim for unpaid wages was dismissed when he obviously undertook the work in question without being properly paid, the fact remains that there is nothing in Herbert's application for reconsideration that would call into question the legal correctness of the adjudicator's decision.

In light of the fact that this application does not raise even a *prima facie* legal justification for the order sought, we are dismissing this application without further comment. As will be seen, there may be avenues (and in another forum) that Mr. Herbert can yet pursue in order to secure his position but this application does not raise a proper legal foundation for setting aside the adjudicator's decision.

THE DIRECTOR'S APPLICATION FOR RECONSIDERATION

We wish to make a preliminary observation with respect to the Director's application. If, as noted above, the delegate's February 7th report constituted an application for reconsideration of the adjudicator's decision with respect to the franchisor's legal position and liability, then the present application is not properly before us. The Director--by way of her delegate's February 7th report--asked the adjudicator to reconsider her decision with respect to the franchisor's position; the adjudicator did so and then confirmed her earlier decision and order regarding this matter.

Since the present application arguably constitutes a *second* attempt by the Director to have the franchisor's position reconsidered, subsection 116(3) of the *Act* could be a complete bar to this application going forward: "116(3) An application may be made only once with respect to the same order or decision".

That being said, however, we do not propose to rest our decision on this procedural ground since, in any event, the grounds upon which this application is founded are not, in our view, meritorious.

The Director's application is set out in a 10-page submission from her legal counsel dated June 15th, 2003. At page 2 of this latter submission, counsel submits that the adjudicator's decision "contains serious errors of law", namely:

- the Adjudicator's finding that the complainants have no recourse against [the franchisor] under the *Act* on the facts in this case is contrary to the purposes and provisions of the *Act*, taken as a whole, and ignores developments in the common law;
- the Adjudicator's analysis of the question of who is an employer relies on previous Tribunal decisions as though they were precedential and fails to give due regard to the purposes and the provisions of the *Act*, taken as a whole; and
- the Adjudicator ignored or failed to understand the analysis provided in the Director's decision on referral back.

Counsel for the Director seeks the following remedy (set out at p. 10 of her submission):

> Remedy Requested:
> The Director requests that the Tribunal exercise its discretion to review the Decision to correct the serious errors of law in it, and that the Tribunal cancel the Decision and confirm the Director's referral back report finding that [the franchisor] is the complainants' employer in this case.

In our view, the above grounds advanced by the Director in support of this application for reconsideration are not well-founded either in fact or in law.

Was the Franchisor the Complainants' Employer?

It was the Director who initially determined that the franchisor was not responsible for the complainants' unpaid wages; by way of the Determination, that latter liability was visited solely on Ms. Phillips. The Director's delegate held that the complainants were employed by Ms. Phillips, not by the franchisor; further, the delegate also concluded that the franchisor could not be "associated" with Ms. Phillips under section 95 of the *Act* and, on that basis, held liable for the complainants' unpaid wages.

Ms. Phillips appealed the Determination alleging that she was not an employer but, rather, an employee of the franchisor as were the other complainants. Ms. Phillips also raised the matter of her infancy. The Director's position, as set out in her submission to the Tribunal dated September 6th, 2002, was that "I stand by my determination" with respect to the "true employer" issue. With respect to the infancy issue, the Director's position was that Ms. Phillips' infancy was irrelevant since the Director was enforcing a statutory, rather than a contractual, obligation.

Adjudicator Taylor dismissed Ms. Phillips' appeal and confirmed the Director's finding with respect to the issue of whether Ms. Phillips was the one and only employer of the complainants. The *only* issue that was referred back to the Director was the question of the legal consequences of Ms. Phillips' infancy (see below), an issue that the delegate identified, but failed to adjudicate, in the Determination. The adjudicator's formal "referral back" order is reproduced below:

> **ORDER**
> Pursuant to section 114 of the *Act,* I refer the Determination issued July 22, 2002, back to the Director for further investigation around the issue of the application of provisions of the *Infants Act.*

In accordance with the adjudicator's order, a report (dated February 7th, 2003) was prepared and filed with the Tribunal. At page 1 of this report, the delegate set out the issue that was being addressed: "What is the effect of Karla Phillips's age on her ability to form contracts of employment or otherwise?". The delegate answered this question at page 3 of his report: "Karla Phillips could not have been the employer because, as a minor, she could not enter into valid contracts to employ the complainants".

Having reached this latter conclusion, the delegate then proceeded to address an entirely separate issue that was not within the ambit of the adjudicator's referral back order and, indeed, had already been finally adjudicated, namely, whether the franchisor was an employer of the complainants. The delegate concluded (at p. 3): "The Director concludes that [the franchisor] was the employer of the complainants and is responsible for the amount of the unpaid wages for each of the four painters". As we previously observed, since this finding was outside the ambit of the adjudicator's referral back order, it could well be characterized as a implied request for reconsideration of the adjudicator's decision on this issue.

Undoubtedly, the Director is concerned that, in light of Ms. Phillips' infancy, it now appears as if the complainants will not be able to recover their unpaid wages. The Director's 180˚ turnabout appears to be motivated by a concern for securing the employees' unpaid wage claims--a laudable motive to be sure, but laudable motives are not a proper basis for overriding previously determined legal and factual issues.

The Director's present assertion is that the franchisor must be the complainants' "employer" because Ms. Phillips cannot be (by reason of her infancy):

> "...at the time of the complainants' hiring, Phillips was *legally incapable* of forming employment contracts with the four complainants. She did so further to her *invalid* franchise agreement with [the franchisor]...
>
> To find, as the adjudicator did, that [Ms. Phillips'] minority meant that no one was a legal employer of the complainants under the Act creates a legal vacuum of employer responsibility. The Director submits that such a finding is legally absurd and is contrary to the purposes of the Act." (Director's Request for Reconsideration at p. 6; our *italics*)

We reject the assertion that Ms. Phillips could not have been the lawful employer of the complainants solely by reason of her infancy. Despite Ms. Phillips' infancy, she was nonetheless the employer--as has been repeatedly determined by both the Director and the Tribunal--of the complainants. We do not accept the Director's present assertion that because Ms. Phillips was an infant she cannot be an "employer" under the *Act.* An "employer" is a "person" who, *inter alia,* directs and controls "employees". A "person" may be an infant; indeed, section 29 of the *Interpretation Act* defines a "minor" as "a *person* under the age of majority" (our *italics*). There is nothing in the *Act* that precludes infants, simply by reason of their status as infants, from being employers or employees. Indeed, there are several provisions in the *Act* and *Regulation* that refer specifically to employees who are infants (e.g., *Regulation,* section 37.4).

In our view, the Director's conclusion that Ms. Phillips cannot be held liable for the employees' unpaid wages (characterized by the Director's counsel as a "legal vacuum of employer responsibility") does not necessarily flow from the adjudicator's decision. Since, Ms. Phillips was, at all material times, an infant person, the employees' unpaid wage claims are presumptively unenforceable against her--that is the effect of section 19(1) of the *Infants Act.* Nevertheless, the B.C. Supreme Court may grant relief to the complainants against Ms. Phillips under the provisions of Part 3 of the *Infants Act.* For example, the court could order Ms. Phillips to pay the employees' unpaid wages under section 20(2)(a) of the *Infants*

Act. Clearly, there is not an inevitable "legal vacuum of employer responsibility", however, such a payment order can only be made by the B.C. Supreme Court; neither the Director nor this Tribunal has the requisite statutory authority to make such an order.

The adjudicator's April 23rd decision specifically noted that the Tribunal's order only meant "that there is no enforceability through the Employment Standards Act for the wage arrears of the employees" (at p. 5). As noted above, there may be other avenues that the complainants might pursue other than the enforcement mechanisms of the *Act.*

Nor do we accept the Director's counsel's submission that both the franchise agreement and the various contracts of employment between Ms. Phillips and the complainants are "invalid" and thus, if Ms. Phillips is not the employer, the franchisor must be declared to be the employer in order to avoid a "legal vacuum". This submission ignores the clear wording of section 19(1) of the *Infants Act;* this subsection does not declare infants' contracts to be *void* but rather only *unenforceable against the infant.* If the intended effect was to declare infants' contracts invalid, the legislature would have used a term such as "invalid" or "void" or "of no force or effect" rather than "unenforceable". Further, section 19(2) of the *Infants Act* (which states that an infant may enforce a contract against an adult party to the contract) in entirely inconsistent with any notion of invalidity. Validity and enforceability are entirely separate legal concepts; the distinction between these two concepts cannot be ignored.

Although the complainants may not be able to enforce their contractual rights against Ms. Phillips (by reason of the latter's infancy), it does not follow that Ms. Phillips cannot be their employer or that the underlying employment contracts are invalid. Ms. Phillips was the one and only employer of the complainants irrespective of her infancy. Counsel asserts, at page 6 of her submission, that the adjudicator held "that the franchisee's minority meant that no one was a legal employer of the complainants". The adjudicator made no such finding. As we noted above, the question of Ms. Phillips' infancy is a separate question from whether she was an "employer". Although the adjudicator held that the employees could not enforce their unpaid wage claims against Ms. Phillips using the enforcement mechanisms available under the *Act,* the adjudicator nonetheless specifically held (at p. 7 of the December 17th decision) that Ms. Phillips *was* the employer of the complainants:

> I have carefully reviewed the reasoning in the two previous Tribunal decisions and concur in their results. Accordingly, I find that the Director did not err in this case in applying those decisions to arrive at the Determination that Phillips entered into a franchise agreement with [Student Works Painters] and that *Phillips,* not [the franchisor], *was the employer of these four employees.* (our *italics*)

The above conclusion was reconfirmed by the adjudicator in her April 23rd decision (at p. 5).

Section 19(1)(a) of the *Infants Act* states that an infant's contract may be enforceable if it is "a contract specified under another enactment to be enforceable against an infant" (see, for example, section 2 of the *Residential Tenancy Act*). However, the *Employment Standards Act* does not contain a similar provision making employment contracts enforceable against infant employers. In the absence of such a provision, it would seem that the complainants do not have a remedy against Ms. Phillips under the *Act;* that fact, however, does not provide a sufficient basis for asserting a legal and factual fiction, namely, that some other third party must, by default, be the complainants' employer.

The complainants do not have a remedy against Ms. Phillips under the *Act.* However, we reiterate that there may be other avenues of recourse open to them.

Treating Previous Tribunal Decisions as Binding Precedents

Counsel for the Director asserts, at p. 4 of her application for reconsideration, that "the Adjudicator...appears to have relied on the previous Tribunal decisions dealing with [the franchisor] to such an extent that she treated them as though they were precedential". Counsel then asserts that previous Tribunal decisions are not binding on an adjudicator in a subsequent case dealing with the same issue.

We do not disagree with the latter statement about the notion of *stare decisis* although clearly (as counsel herself observes), there is value in any administrative tribunal striving to achieve consistency and predictability in its decisions and decision-making process. However, the Director's counsel's submission on this point fundamentally misapprehends the adjudicator's analysis and findings.

Rather than blindly following prior decisions, the adjudicator--as she herself stated (December 17th decision at p. 7)--"carefully reviewed the facts and arguments presented in this case as compared to the facts in the two previous Tribunal decisions" and then reached an *independent* conclusion, after having "carefully reviewed the reasoning in the two previous Tribunal decisions [that she] concur[red] in their results". The adjudicator then stated: "*On the facts,* I find that Phillips was not an employee of [the franchisor] and that she hired the four employees" (our *italics*).

The delegate requested, by way of his February 7th report (at least by implication), that the adjudicator reconsider this latter finding. Although the adjudicator could have legitimately refused to revisit her earlier (and final) determination on that issue, the adjudicator nonetheless reviewed her prior decision with respect to the franchisor's status and then concluded: "Nothing has been presented by the Director or any other party that would alter my decision". The adjudicator proceeded to reconfirm her earlier finding with respect to the franchisor's legal status: "I find that the Director's conclusion that [the franchisor] is an employer of the painters is not tenable".

We now turn to the third and final argument advanced by counsel for the Director.

The Adjudicator Ignored or Failed to Appreciate the Director's Analysis

Counsel for the Director says (at p. 10 of her application for reconsideration) "that the adjudicator seems to have ignored or failed to understand the Delegate's analysis of the definition of 'employer' which led to his conclusion in the referral back report that [the franchisor] was the complainants' employer in the circumstances of this case".

In our view, the adjudicator did not misunderstand the delegate's argument on this latter point; she reviewed the delegate's analysis and found it wanting. We do not disagree with the adjudicator's conclusion on this issue.

ORDER

The applications for reconsideration are both refused.

Kenneth Wm. Thornicroft **Adjudicator, Panel Chair** **Employment Standards Tribunal**	**David B. Stevenson** **Adjudicator** **Employment Standards Tribunal**	**Alison Narod** **Adjudicator** **Employment Standards Tribunal**