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 -

Galter Holdings Ltd.
(" Galter Holdings ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: David B. Stevenson
C. L. Roberts
Kenneth Wm. Thornicroft

FILE No: 2000/152

DATE OF DECISION: July 24, 2000

OVERVIEW

Galter Holdings Ltd. ("Galter Holdings") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of an Adjudicator of the Employment Standards Tribunal (the "original decision"), BC EST #D074/00, dated February 10, 2000. The original decision confirmed a Determination dated September 16, 1999, which had concluded that Phillip Brent ("Brent"), a former employee of Galter Holdings, was owed $1829.85 in unpaid wages, together with interest calculated under Section 88 of the *Act*.

This application is timely. It asks that the Tribunal exercise it authority under paragraph 116(1)(b) of the *Act* to cancel the original decision and refer the matter back to the original panel (the "Adjudicator") to be reheard. Two reasons are provided to support this request, which we shall only summarize at this stage:

1. The Adjudicator was wrong to refuse to allow the representative of Galter Holdings, Alex Laverick, to tape record the proceedings; and

2. Galter Holdings was denied a fair hearing when the Adjudicator ended the hearing because the representative of Galter Holdings refused to comply with the Adjudicator's order to stop recording the proceedings.

BACKGROUND

The circumstances which give rise to this application are described in the original decision:

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

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

116. (1) On application under subsection (2) or on its own motion, the tribunal may

(a) reconsider any order or decision of the tribunal, and

(b) *cancel or vary the order or decision or refer the matter back to the original panel*.

(2) *The director or a person named in a decision or order of the tribunal may make an application under this section.*

(3) An application may be made only once with respect to the same order or decision.

In deciding whether to exercise its discretion under Section 116, the Tribunal has adopted a two stage analysis of the application before it. At the first stage, the Tribunal assesses whether the matters raised in the application warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised a question of fact or of law, principle or procedure under the *Act* which is so significant they should be reviewed, either because of their importance to the parties or because of their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

In our opinion, this application raises significant issues of law and policy relating to the authority of the Tribunal under Part 12 of the *Act* and is an appropriate case for reconsideration. The issues raised by this application are whether the Adjudicator was wrong to refuse to allow Mr. Laverick to tape record the proceedings and whether, notwithstanding the answer on the first issue, the decision of the Adjudicator to bring the hearing to an end when Mr. Laverick refused to comply with his order to stop recording the proceedings was unfair and contrary to the principles of natural justice.

1. Tape Recording Tribunal Proceedings

The decision of the Adjudicator to refuse to allow Mr. Laverick to tape record the proceedings was an exercise of the statutory discretion granted to the Tribunal under Section 107 of the *Act*, which reads:

> *107. Subject to any rules made under Section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.*

The Adjudicator identified several factors that contributed to his decision. While counsel for Galter Holdings expresses his client's disagreement with the Adjudicator's order to stop tape recording the proceedings, he does not argue or suggest that the factors identified by the Adjudicator were irrelevant or extraneous to the purposes and objectives of the *Act*. Based on the circumstances outlined in the original decision, the panel finds that the order to stop recording the proceedings was a rational and reasonable procedural constraint imposed on Mr. Laverick by the Adjudicator. We also note that counsel for Galter Holdings, while not going so far as conceding the order was reasonable, does acknowledge in his April 19, 2000 reply submission, that no issue of unfairness arises from that order.

We agree with the opinion expressed in the original decision that the Tribunal should not allow its proceedings to be recorded unless special circumstances exist. Ultimately, however, where a party involved in an oral hearing before the Tribunal requests the proceedings be recorded, the question of whether the circumstances justify accommodating that request, including what conditions, if any, might be imposed if the request is granted, is a matter of discretion for the Adjudicator. In *Maple Lodge Farms Ltd. -and- Government of Canada et al* [1982] 2 S.C.R. 2; (1982) 137 D.L.R. (3d) 558 (considered in *Glover v. Plasterer and others* (1998) 52 B.C.L.R. (3d) 234 (B.C.C.A.)), the Supreme Court of Canada set out the appropriate standard of review of an exercise of discretion of a statutory body such as the Tribunal:

> It is . . . a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

Applying that statement, Galter Holdings has not convinced us that there is any basis for interfering with the decision of the Adjudicator to refuse to allow Mr. Laverick to tape record the proceedings.

2. The Consequences of Non-Compliance With the Adjudicator's Order

Counsel for Galter Holdings argues that this aspect of the reconsideration application is about fairness and natural justice. He contends that "a fundamental unfairness" occurred which, he says, arose from the Adjudicator's decision to terminate the hearing without declaring an adjournment to allow Mr. Laverick to seek advice in respect of the order to stop tape recording the hearing. In the reconsideration submission, that contention is stated in the following way:

> The principles of natural justice would seem to require that, in the case of unrepresented lay parties, an adjournment of the hearing for a period of time, sufficient to allow the party to obtain legal advice as to his rights, and the rights

> and prerogatives of the adjudicator, should have been suggested and granted by the adjudicator.

It is beyond controversy that when conducting an oral hearing under the *Act*, the Tribunal is exercising an adjudicative and quasi-judicial function and, as such, owes a general duty of fairness to the parties whose interests are being considered that approaches the full panoply of the principles of natural justice (see the comments of Sopinka, J. in *S.E.P.Q.A. v. Canadian Human Rights Commission*, [1989] 2 S.C.R. 879 at 899). The Adjudicator had a general duty to be fair to Galter Holdings and Galter Holdings had a right to be treated fairly by the Adjudicator. In the context of this application, the duty to be fair refers in the main to procedural fairness, including a fair and reasonable opportunity to make one's case, to contradict or correct the other party's case, to cross-examine the other party's witnesses and to make representations.

The essential question under this heading is whether the Adjudicator treated Galter Holdings fairly. More specifically, was it procedurally unfair, and consequently a denial of natural justice, for the Adjudicator to have ended the hearing following Mr. Laverick's refusal to comply with the order to stop recording the proceedings?

Before addressing this question, we wish to comment on four matters. First, the conduct of Mr. Laverick in defying the order to stop recording the proceeding was improper. In the context of the quasi-judicial function exercised by the Tribunal, the decision by Mr. Laverick to defy the order of the Adjudicator was nothing less than a display of contempt for his authority. The Tribunal has no authority to punish for contempt. The Tribunal is, however, given the statutory authority to control its own procedures. In essence, the decision of the Adjudicator to end the hearing was an exercise of his statutory authority to control the proceeding in the face of, and in response to, contemptuous conduct.

Second, as noted above, counsel for Galter Holdings accepts that the question of unfairness does not arise from the Adjudicator's decision to order Mr. Laverick to stop tape recording the proceedings. In fact, counsel for Galter Holdings concedes that the correct course for Mr. Laverick to have taken was to have complied with the order and continued with the hearing. If, following the decision, Mr. Laverick felt the procedural ruling by the Adjudicator had the effect of denying Galter a fair hearing, that could have formed the basis for a reconsideration application.

Third, in the reconsideration application, counsel for Galter Holdings argues that his client was deprived of an opportunity to be heard because the Adjudicator terminated the oral hearing. He states:

> . . . I am particularly concerned that the employer, Galter Holdings Ltd., has been deprived of an opportunity to establish the facts of this situation.

Simply put, Galter Holdings was not denied an opportunity to be heard and we reject any assertion to the contrary. It is true that Galter Holdings lost its opportunity to continue with an oral hearing on its appeal, and we will address later whether the Adjudicator's decision to bring the hearing to an end was unfair, but in actual fact Galter Holdings lost that opportunity because

of the contemptuous behaviour of its representative, Mr. Laverick. As much as Mr. Laverick may have objected to the order to discontinue recording the proceedings, there is general agreement that he should have complied. Instead, he steadfastly defied the Adjudicator's authority. Mr. Laverick was clearly notified of the order, advised of the consequences of non-compliance and provided with an opportunity to consider his position in light those consequences. His response was to continue to defy the order; the Adjudicator's response was to end the hearing.

Accepting that a reasonable opportunity to be heard is an essential aspect of procedural fairness, the scope of that opportunity is not unlimited. We agree, as counsel for Galter Holdings suggests, that it is sensible for the Tribunal to permit some latitude to the parties, particularly where the participants are lay persons. However, the Tribunal must be able to control its own process. Galter Holdings was given an opportunity to be heard fully. An opportunity is all that is required (see the comments of Madam Justice Wilson in *R. v. Potvin*, [1989] 1 S.C.R. 525 at 543, 47 C.C.C. (3d) 289 at 301). As the original decision notes, Mr. Laverick, as Galter Holdings' representative, participated fully in the hearing up to the time he defied the order to stop recording the proceedings. Any restriction on the opportunity given to Mr. Laverick to present evidence was due to his own deliberate and voluntary defiance and he must bear the consequences of that conduct (see *Vanton v. British Columbia Council of Human Rights* [1994] B.C.J. No. 497, ¶_37 - ¶ 42).

Fourth, counsel for Galter Holdings says there were facts about which the Adjudicator expressed reservations and that a "miscarriage of justice based on the facts" is one factor that:

> . . . surely require[s] a higher level of tolerance for the unsophisticated lay applicant.

We do not agree that the Adjudicator expressed any "reservations" about the facts. The Adjudicator did comment that there were some serious questions of fact raised in the evidence presented by Galter Holdings that might have been resolved by the hearing. The Adjudicator did not, however, hear evidence or representations during the hearing from either Brent or the Director on those questions of fact before the proceeding was interrupted. His comment was made in the context of pointing out that he could not accept Galter Holdings' evidence without denying Brent and the Director a fair hearing. In any event, a question about the correctness of the original decision is not an appropriate consideration in deciding whether Galter Holdings was treated fairly. This argument is simply another aspect of the argument that Galter Holdings was denied an opportunity to be heard. The Adjudicator's inability to fully canvas the factual disputes raised in the appeal was brought about by Mr. Laverick's refusal to comply with the order, nothing more, nothing less. It is somewhat perverse to suggest we should consider the veracity of assertions of fact which were not tested against other evidence only because of the conduct of Mr. Laverick. Fairness is, after all, a two-way street.

Turning to the question of whether the Adjudicator acted fairly when he terminated the hearing because of Mr. Laverick's conduct, we find that the Adjudicator did not act unfairly in the circumstances.

Counsel for Galter Holdings says it would have been a simple thing for the Adjudicator to have adjourned for a period of time sufficient to allow Mr. Laverick to seek advice on the order to stop recording the proceedings, keeping in mind Mr. Laverick was a lay litigant. We do not accept that the "lay" status of Mr. Laverick is a significant consideration. He openly defied the authority of the Tribunal to make a reasonable procedural order with knowledge of the consequences of continued defiance. We fail to see any correlation between his conduct and his status as a "lay" litigant. He was told the Adjudicator had the authority to make the order and the hearing would be ended if he continued to refuse to comply. Counsel for Galter Holdings is really suggesting that the Tribunal should mold its statutory mandate and its procedural authority to accommodate the unreasonable litigant. We will not do that. As for the matter of an adjournment, we note there were several events that occurred between the Adjudicator discovering Mr. Laverick had been surreptitiously tape recording the hearing and his decision to end the hearing that offered Mr. Laverick the opportunity to both seek advice, if he wished it, and to re-consider his position: first, the Adjudicator requested and received submissions from the parties on whether Mr. Laverick should be allowed to record the proceeding; second, he adjourned the hearing to consider the parties' submissions; third, he provided the parties with an analysis of the rationale for refusing to allow the tape recording to take place; and, finally, he allowed Mr. Laverick a chance to comply with the order and he advised Mr. Laverick of the potential consequences of refusing to comply with the order. Mr. Laverick did not indicate he wished to seek or required advice. Nor did he request an adjournment at any time to consider his position in respect of the order - he simply defied it. As the Adjudicator notes, he "made it impossible to continue the hearing".

There is no suggestion that another adjournment prior to ending the hearing would have altered Mr. Laverick's view or his conduct. Even after the hearing was brought to an end, there is nothing in the subsequent events that would compel a conclusion that Mr. Laverick might have had immediate regrets about his defiance. The hearing was conducted on January 21, 2000. The decision was not issued until February 10, 2000. No effort was made by Mr. Laverick in the time between the hearing and the decision to acknowledge his error, to indicate he would comply with the order and/or to request the Tribunal continue the hearing. This application was not filed until March 10, 2000 - one month following the original decision. Even at this stage, there is no suggestion that Mr. Laverick's position has changed. The first ground of reconsideration is that the Adjudicator was wrong in refusing to allow the tape recording. Notwithstanding the qualified concession made by his counsel about how Mr. Laverick ought to have responded to the order, Mr. Laverick himself has never made any concession that his conduct was improper or that he was wrong to have defied the order.

To accede to the position taken by counsel for Galter Holdings would place unreasonable procedural constraints on the Tribunal and would mitigate against one of the main objectives of the appeal process - to be efficient, expedient and cost effective. It would be extremely inefficient to require adjudicators to adjourn their hearings each time a procedural order is made in order to allow any of the parties to seek advice and consider whether they will comply with or defy the order. It also ignores that there are other parties who have an equal right to a fair and efficient process. The Tribunal does not meet its obligations to those parties by adopting a position which would allow its hearings to get bogged down in a morass of procedural delays.

In summary, the position in which Mr. Laverick now finds himself was self inflicted; brought about by his misguided view that he had an absolute right to tape record the proceedings and by his stubborn refusal to let go of that view and comply with the order made by the Adjudicator that he stop. There is no reason to rescue him from his actions.

ORDER

Pursuant to Section 116 of the *Act*, the application for reconsideration is denied.

David B. Stevenson
Chair of the Panel
Employment Standards Tribunal

C. L. Roberts
Adjudicator
Employment Standards Tribunal

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal