

**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 -

James Hamilton  
("Hamilton")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE NO.:** 2000/250

**DATE OF DECISION:** August 8, 2000

## DECISION

### OVERVIEW

This is an appeal brought by James Hamilton (“Hamilton”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 15<sup>th</sup>, 2000 under file number ER 96703 (the “Determination”).

This appeal concerns the interpretation and application of section 10(1) of the *Act* which provides as follows:

*10. (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for*

- (a) employing or obtaining employment for the person seeking employment, or
- (b) providing information about employers seeking employees.

### FACTS

For the past ten years, the Parks and Recreation Department of the District of West Vancouver has organized and presented the “Harmony Arts Festival” which is a forum to showcase the talent of various artists and performers who live in greater Vancouver and, more particularly, the North Shore. The festival will run from August 4<sup>th</sup> to 13<sup>th</sup> this year. The festival is a free public event.

I understand that some 350 artists/performers will appear at the festival this year. Artists and performers who wish to participate in the festival must first have their work or performance reviewed by an adjudication and selection committee. A \$15 application and processing fee is charged to all prospective festival artists and performers; this fee is charged as a way offsetting certain out-of-pocket expenses incurred by the selection committee. The artist or performer chooses what particular work or works they wish to have reviewed by the selection committee.

If the artist or performer passes muster with the selection committee, a contract to exhibit or perform at the festival is offered; the performer is paid a gross amount without consideration for any of the usual payroll deductions and remittances. The festival does not take ownership over any work exhibited or performed at the festival and the artists remain solely responsible for the preparation and presentation of their work—including, in the case of musicians, travel to and from the venue, arranging for instruments, sound systems, props, costumes, stage sets etc. Musicians are typically contracted to perform at certain times and on certain days of the festival. There is nothing in the “Letter of Agreement”—which all musicians sign—prohibiting musicians from performing elsewhere either during or after the festival.

Hamilton submitted an application to the festival on behalf of two musical groups, namely,

“Eastern Star” and Celtic Aires”, but refused to pay the \$30 application fee (\$15 for each group); the application was thus rejected. In his complaint filed with the Employment Standards Branch, Hamilton alleged that the \$15 fee contravened section 10(1)(a) of the *Act* and asked for an order effectively enjoining the District of West Vancouver from continuing to charge application fees and, in addition, Hamilton sought compensation for having had his application to participate in the festival summarily rejected.

The Director’s delegate determined that since Hamilton was not “seeking employment” on behalf of the two musical groups in question, the District of West Vancouver did not contravene section 10(1)(a) of the *Act*. The delegate concluded that the District of West Vancouver did not engage artists and performers to appear at the festival as an “employer” but, rather, that the artists and performers were engaged as “independent contractors”. Accordingly, Hamilton’s complaint was dismissed.

### **ISSUES ON APPEAL**

In his appeal documents, Hamilton challenges the Determination saying that the rationale set out therein is “faulty and discriminates against *self-employed musicians*” (my *italics*). Mr. Hamilton asserts that the Determination reflects “a legalistic definition of employment” and that the Determination sets a “bad precedent” that “will seriously affect the ability of musicians to make a living”.

### **ANALYSIS**

As noted above, Mr. Hamilton described the festival applicants as “self-employed musicians”. Of course, saying that one is self-employed is merely another way of stating that one is an independent contractor. Mr. Hamilton seemingly does not appreciate that his own appeal documents undermine his position on appeal.

I quite agree with the delegate that section 10(1)(a) of the *Act* only proscribes fees demanded from, or payable by, prospective *employees*. Further, I completely agree with the delegate that artists and other performers participating in the festival do not become, by reason of that fact alone, employees of the District of West Vancouver.

The question of whether or not a particular individual is an employee is an issue of mixed fact and law and the delegate need not apologize for taking a “legalistic approach” –simply a pejorative way of stating that the delegate analyzed the issue by applying governing legal principles. As for the delegate’s legal analysis, I am of the view that the delegate correctly instructed himself as to the relevant legal principles and, further, correctly applied those principles to the facts at hand.

The appeal is dismissed.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**