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 -

ILS Entertainment Group Ltd.
(the " Appellant ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/437

DATE OF DECISION: September 15, 2000

DECISION

APPEARANCES

Lucas Lo	for the employer
David Nielson	for himself
Julie Brassington	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by ILS Entertainment Group Ltd. (the "employer") from a Determination dated June 1, 2000. That Determination found the employer liable for outstanding wages to the complainant in the amount of $4,344.29. The delegate determined that the employer had breached Sections 17 and 58 of the *Act*.

ISSUE(S) TO BE DECIDED

1. Is the complainant an employee?
2. If the answer to question one is yes, did the delegate err in the calculation of monies owed to the complainant?

FACTS

The employer is in the business of making movies. David Nielson, the complainant, was hired on October 28, 1999, as the Art Director for the "Black Door" film project. A deal memo was signed by the parties on November 2, 1999, which called for a total wage amount of $15,000 payable at $3,000 a week over 5 weeks. The start date for the project is listed as November 12, 1999.

On November 12, 1999 Mr. Nielson quit the Black Door project apparently due to the fact that he was not being paid. All parties agree that Mr. Nielson received payment for the first week of the project but has not received any money for the second week or the two days worked in the third week of the project.

At some point the employer contacted the police alleging that Mr. Nielson had misappropriated $2,000.00 that was to be used to purchase props for the project. The submissions indicate that criminal charges were not prosecuted by Crown Counsel.

ANALYSIS

The Determination made by the delegate addresses the issues of employee status of Mr. Nielson and the quantum of wages owing. The delegate found that Mr. Nielson was an employee. The employer challenges that finding arguing that Mr. Nielson is an independent contractor. The employer does not dispute that Mr. Nielson is owed some money but does dispute the actual amount. In its appeal submission the employer raises three separate points as to why the amount owing should be reduced. I will address these points accordingly but firstly I turn to the argument that Mr. Nielson himself is an employer.

The respondent employer challenges the finding that the complainant was an employee. A review of the Determination indicates that the delegate assessed the factors of the control test, the four fold test, the organizational/integration test and the permanency test. In applying those tests the delegate determined that Mr. Lo, for the employer, had control and direction of the film for which Mr. Nielson was hired. Mr. Lo participated in the hiring of Mr. Nielson. Mr. Nielson reported to Mr. Lo and attended several meetings called by Mr. Lo regarding the project. The hours of work at 12 hours per day were set by Mr. Lo not Mr. Nielson. Mr. Nielson's services were exclusive to the employer and the employer reserved the right to terminate Mr. Nielson at any time. The delegate further determined that the employer set Mr. Nielson's wages.

The delegate further determined that Mr. Nielson did not risk financial investment, supply capital or risk a liability in the project. Mr. Nielson was not permitted to provide similar services to other parties or to be actively involved in searching out other work during the course of his employment with the employer. As a result the delegate determined that Mr. Nielson did not have a chance for profit or a risk of loss.

The employer raises the issue that Mr. Nielson employed three persons during the course of his work for ILS. Mr. Lo argues that a person cannot be both an employer and an employee. The delegate investigated this matter and determined that the three persons were not employees but rather were students working a practicum through a local film school. These students are exempt from the *Employment Standards Act* as they are not defined as employees. I agree with the delegate on this point.

In summary I find that the delegate correctly applied the tests for determining whether a person is an employer or an employee. The delegate determined that the employer, ILS Entertainment Group Ltd., controlled the production upon which Mr. Nielson worked. Mr. Nielson did not run a chance of profit or a risk of loss yet he was integrated into the employer's operation. The employer controlled that operation through its setting of the hours of work and its requirement that Mr. Nielson work solely for this employer during the period of his contract. For these reasons I dismiss the employer's argument that Mr. Nielson was not an employee.

I turn now to the arguments that were raised by the employer to show why the delegate's Determination should be reduced.

Firstly, the employer argues that the delegate has made factual errors. The employer argues that Mr. Lade, Secretary-Treasurer of the employer until November 11, 1999, stated that he agreed

that Mr. Nielson was owed $6,000.00, when in fact Mr. Lade only stated that Mr. Nielson had informed him that he, Mr. Nielson, was owed $4,500.00. This statement by the delegate was made in a letter sent to the employer on April 19, 2000. There is no indication in the Determination that the delegate relied on this statement in determining how much was owed to Mr. Nielson. In fact, the delegate determined that Mr. Nielson was owed $4,000.00, plus vacation pay and interest. The mere fact that the delegate may have been mistaken about a statement made during the investigation process, without evidence that this mistake has materially affected his determination, is not enough to overturn a decision.

Secondly, the employer wishes to have the $2,000.00 allegedly given to Mr. Nielson for the purchase of props deducted from any amount the employer owes Mr. Nielson. Section 21 of the *Act* states:

> (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by regulations.
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

It does not appear from the submission that the employer is taking the position that the $2,000.00 was paid to Mr. Nielson as wages although the employer offers that the reason Mr. Nielson did not spend the money on props was that he claimed he was owed wages. It is well established that even where it is shown that an employee has stolen money from an employer that money is not deductible from the amount the employer owes the employee. The remedy for the employer is through the Courts. (*Re Park Hotel (Edmonton) Ltd. (c.o.b. Dominion Hotel),* BC EST #D539/98, varied on other grounds BC EST #D257/99). The issue of whether Mr. Nielson used this money for other purposes is not before me. In situations such as this the employer cannot claim an offset as its claim does not fall within s. 21 of the *Act*.

Thirdly, the employer questions the amount of hours worked by Mr. Nielson during his employment with the company. It is not clear from the material filed by the employer whether the reliance by the delegate on the deal memo signed on November 2, with a start date of November 12, 1999 is being challenged. Since the employer is not disputing that Mr. Nielson is owed some money, and the evidence is clear that the work done by Mr. Nielson was done before November 12, 1999, I will assume that the deal memo included in the material was the basis for the contract of employment between the two parties.

The employer claims that Mr. Nielson did not work the 12 hours per day as required by the deal memo. The employer did not keep records of Mr. Nielson's hours of work and has requested an accounting of the hours work from Mr. Nielson. The employer has submitted no evidence that Mr. Nielson was requested to show actual hours worked nor does it appear that this issue was raised during the investigation. It is well established that the employer cannot raise issues on appeal that should have been raised during the investigation proceedings. (*Re Tri-West Tractor Ltd.* BC EST #D268/96). There is no evidence that Mr. Nielson didn't work the required hours

per day. The onus therefore rests on the appellant employer to prove that the hours were not worked. That onus has not been discharged.

ORDER

The Determination dated June 1, 2000 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal