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 -

City of Surrey
(the "City")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS:	David Stevenson Mark Thompson John Orr
FILE NO.:	98 / 337
DATE OF DECISION:	September 25, 1998

DECISION

OVERVIEW

This is an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*) by the City of Surrey (the "City") of a decision of a panel of the Employment Standards Tribunal (the "original panel") dated September 25, 1997 (the "original decision"). The original decision addressed the question of whether persons attending the Fire Academy of the Justice Institute were, for the purposes of the *Act*, "employees" of the City, and answered that question in the affirmative.

The City says the original decision is wrong for several reasons, both factual and legal. The sum and substance of the original decision is found in the following passage:

> For all the foregoing reasons, we are satisfied that the Director did not err in determining that the complainant employees were "person[s] being trained by an employer for the employer's business" while they were enrolled at the Fire Academy.
> (page 12)

The City argues that conclusion contains two errors: first, that the persons being trained at the Fire Academy were being trained for the City's business; and second, that the persons were being trained by the City. In respect of that argument, they take issue with five conclusions of fact made by the original panel, taking the position they are either misleading, incomplete or incorrect. The City also argues the original panel erred when it concluded the Fire Academy was an agent of the City. This argument arises from the following statement in the decision of the original panel:

> We are of the view that Surrey has not merely "contracted out" the initial training of firefighters to the Fire Academy. In effect, The Fire Academy has been engaged as an agent for Surrey to undertake the initial training of Surrey firefighters. In any agency relationship, the agent is obliged to keep its principal informed and carry out duties on behalf of the principal as instructed by the principal. In the present case, the evidence discloses that the Fire Academy is not an autonomous training agency; rather, Surrey is intimately involved, insofar as its own recruits are concerned, at every stage of the Fire Academy training process - from admission to graduation.

The City also says the original decision is contrary to the remedial purpose of the *Act*, contrary to public policy and contrary to what the City and each of the persons intended

and agreed at the time that person accepted enrollment in the Fire Academy.

FACTS

The appeal before the original panel was heard over two days, June 30 and August 5, 1997, during which six witnesses were presented, two on behalf of the City and four on behalf of the individuals. The Director participated, but called no evidence. All parties were represented by legal counsel. The original panel heard submissions on the evidence presented and considered the arguments made by the parties in their written submissions on the file and to the Tribunal on the appeal.

The original panel framed the issue as follows:

> The only issue that the panel is called upon to decide this time is whether or not the Director erred in concluding that there was an employment relationship between Surrey and the Employees while they were enrolled as students at the Fire Academy. To put the matter another way, were these 24 individuals being "trained" by Surrey to work as Surrey firefighters while they were attending the Fire Academy?

No one has suggested the original panel incorrectly framed the issue. For ease of reference, we shall refer to the persons who filed the complaints as the "individuals".

The original panel approached the issue by addressing the question of whether the individuals met the definition of "*employee*" under the *Act* and, in the context of that definition, whether the City was the employer.

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.

The circumstances in which an application for reconsideration will be successful are limited. Those circumstances have been identified in several decisions of the Tribunal, commencing with *Zoltan Kiss*, BC EST #D122/96. In *British Columbia (Director of Employment Standards)*, BC EST #D479/97, the Tribunal summarized its approach to Section 116 of the *Act* in the following way:

> It is now firmly established that the Tribunal will not interpret the above provision [Section 116] to allow any dissatisfied party an automatic right of review. To the contrary, the Tribunal has stated the reconsideration provision will be used sparingly and has identified a number of grounds upon which the Tribunal may choose to reconsider an order or decision. These grounds may be summarized as cases demonstrating: a breach of the rules of natural justice; a significant error of fact that is either clear on the face of the record or that arises from the introduction of new evidence that is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the party seeking to introduce it; a fundamental error of law; or an inconsistency with other decisions of the tribunal which are not distinguishable on their facts.

There is one matter which, while not being raised directly by the City, appears to be central to their application. Implicit in their argument is a basic disagreement with the conclusion of the original panel that the City could be found to be an employer of the individuals. We find no basis for this disagreement. We are satisfied the facts justified a finding that the City met the definition of *"employer"* in the *Act* relative to the individuals. This finding was based primarily on the degree of control found to be exercised by the City in respect of the training of the individuals. The original panel stated, at pages 9 and 10:

> Even though the recruits were enrolled as students of the Fire Academy, Surrey nonetheless exercised residual *control* over the recruits' activities. This control was exercised in a variety of ways such as:
>
> > Surrey (and other sponsoring fire departments) control the Fire Academy admissions process;
> >
> > the Fire Academy consulted Surrey as to disciplinary matters and generally reported to Surrey regarding the recruits' progress; and
> >
> > Surrey Fire Department officials, during the course of the training program, sought feedback from their recruits which, in turn, was passed on to the Fire Academy for necessary action.
>
> In our view, Deputy Chief Barnard's testimony clearly demonstrates that the Fire Academy did not, unlike virtually any post-secondary educational institute in the province, play any role in determining who was enrolled as a Fire Academy student:
>
> > "We control who gets selected into the Fire Academy program . . . we make the decision on who we hire . . . the J.I. plays no role in who we select or recruit; the J.I. accepts our decisions . . . Surrey's class size [at the Fire Academy] is determined by Surrey."

One of the elements that defines an employer under the *Act* is control of employees. The definition reads:

> ***"employer"*** *includes a person*
>
> > *(a) who has or had control or direction of an employee, or*
> >
> > *(b) who is or was responsible, directly or indirectly, for the employment of an employee;*

It follows that if the individuals, over whom the City was found to exercise *control*, come within the definition of *"employee"* in the *Act*, there is no error in the conclusion that the City is their employer.

The more direct and substantive disagreement raised by the City with the original decision is the conclusion that the individuals are "employees" of the City. Section 1 of the *Act* defines who is included in the definition of employee:

> ***"employee"*** *incudes*
>
> *(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
>
> *(b) a person the employer allows, directly or indirectly, to perform work normally performed by an employee,*
>
> *(c) a person being trained by an employer for the employer's business,*
>
> *(d) a person on leave from an employer, and*
>
> *(e) a person who has a right of recall;*

The original panel found the individuals to be employees of the City for the purposes of the *Act* on the basis of paragraph (c), that they were *"being trained by an employer for the employer's business"*. The City says the original panel was wrong to conclude the individuals were being trained for the City's business and wrong to conclude the individuals were being trained by the City. They challenge conclusions of fact and conclusions of law.

As indicated above, the onus is on the City to bring this application for reconsideration into one or more of the grounds on which the Tribunal may reconsider a decision under Section 116.

Findings of Fact

We will first address the disagreement taken by the City with several factual conclusions made by the original panel. As stated above, the Tribunal will not allow reconsideration to be used simply as another opportunity to seek a review of the evidence or to challenge findings of fact, unless there is a mistake of fact that is clear on the face of the record or which arises from new evidence that is both relevant to the decision and was not reasonably available at the time of the original hearing. The rationale for the approach of the Tribunal is rooted in two primary objectives - to provide *"fair and efficient procedures for resolving disputes over the application and interpretation of the Act"* and the need to achieve some finality to Determinations made by the Director. A continuous review of the evidentiary basis of a Determination or a Tribunal decision from panel to panel does not meet those objectives.

Simply put, the City has not shown the factual conclusions of the original panel are wrong. There is no doubt the City disagrees with some of those conclusions and disputes whether they are supported by evidence presented during the hearing. Some of what the City characterizes as incorrect findings of fact are simply a re-casting of accepted facts and a re-introduction of assertions of fact made before the original panel in order to re-argue conclusions made by the original panel. Also, while the submission of Counsel for the City offers some different perspectives on the evidence, it does not indicate where, on the face of the record, we should find the conclusions of fact made by the original panel are incorrect or unjustified.

Being Trained for the Employer's Business

It strains credulity for the City to suggest that the individuals were not being trained for the City's business. In our opinion, there is ample support on the face of the record for that conclusion. The City provides five reasons why, as a matter of law under the *Act*, the conclusion is incorrect, which we shall summarize:

1. An individual graduating from the Fire Academy has achieved a training standard that allows them to apply for employment at many fire departments in Canada and the United States;

2. Any role played by the City in assisting the Fire Academy in acquiring accreditation is irrelevant to the issue of whether an individual is being trained for the City's business and the City provided no teaching faculty;

3. The original panel ignored the "agreement" between the City and the individuals, which, it is argued, is relevant because it does not compel the individual to accept the City's offer of employment following graduation;

4. It was incorrect to say that graduation from the Fire Academy does not provide the individuals with a marketable skill; and

5. There is no evidence that the City carefully monitors the Fire Academy program.

In our opinion, the City has not established a reviewable error. The first, third and fourth reasons listed by the City have marginal relevance to the original decision. Substantially the same submissions were made to the Director in response to the complaints and to the Tribunal in the appeal under Section 112 of the *Act*. There is no suggestion in the original decision that any of those assertions were rejected by the original panel. At the same time, it is apparent the original panel addressed the question of whether the individuals were being trained for the City's business from the perspective of the purpose for their presence at the Fire Academy. We agree that is the proper perspective from which to address whether a person is being trained *"for the employer's business"*. As such, the qualifications an individual would possess upon graduation from the training program or on where an individual might market the skills acquired in the training program are not relevant unless they assist in determining the purpose for the individual's training.

It is undisputable that the presence of the individuals in the Fire Academy had a very specific purpose from the City's perspective: to be trained as firefighters for the City. The individuals were certainly not recruited, tested, selected and recommended by the City to attend the Fire Academy so they could be trained for some other municipality's fire department, or even so they could be trained generally. The original panel correctly focused their analysis on the purpose, or objective, rather than on the result and the argument of the City, which focuses on the result of the training, is misdirected.

Even the "agreement", upon which the City places considerable reliance as demonstrating the error of the original panel on this point, supports the original panel's conclusion. The "agreement" purports to be contained in a letter given to the individuals who were selected by the City to attend the Fire Academy says, in part:

> Congratulations, you have been recommended to attend the [nine or twelve] weeks recruit training program at the Justice institute's Fire Academy. This program will begin [date].

> Upon successful graduation from the Justice Institute's Fire Academy you will be offered employment as a probationary firefighter with the City of Surrey provided that: your driving record is maintained, you do not acquire a criminal record and your current level of physical fitness is sustained.

The letter indicates no other purpose for the attendance of the individual at the Fire Academy than to be trained for the City's fire department.

The second reason listed does nothing more than challenge conclusions of fact made by the original panel and the relevance of evidence before the original panel. As indicated elsewhere in this decision, the burden on the City when challenging conclusions of fact is to clearly demonstrate, either from the material on the record or from properly introduced and relevant new evidence, that the original panel erred in reaching its conclusions of fact. Similarly, simply asserting that certain evidence referred to or relied on by the original panel is irrelevant does not advance the argument of the City. At a minimum, the City would have to show first, that the challenged evidence was critical to some aspect of the original decision and second, why this panel should conclude the evidience is irrelevant. There is nothing in the City's submission that addresses either of those two matters. In any event, this evidence does appear to have relevance to the issue of whether the Fire Academy recruits allowed into the program by the City were being trained for the City's business. In our opinion, any evidence that shows the City played a "significant role" in the accreditation of the Fire Academy to the NFPA 1001 standard is clearly related to whether the City was, in effect, ensuring that its recruits would continue to be trained to the standard demanded by the City for its business. What weight the original panel put on such evidence is not for us to say, we can only say its relevance is apparent.

The fifth reason listed simply asserts there was no real evidence for a conclusion of fact made by the original panel. The argument asserts the original panel relied upon evidence which it says was irrelevant and speculative. The argument of the City is itself speculative and presupposes there was no other basis for the conclusion made. That argument is not sufficient to allow us to second guess the conclusion made by the original panel.

This aspect of the application for reconsideration is rejected.

Being Trained by an Employer

The City has not shown any reviewable error in the conclusion by the original panel that the individuals were being trained by the City.

The original panel recognized that the training of the individuals was undertaken by the Fire Academy, but refused to take a literal approach to the interpretation of the definition of *"employee"*. The original panel was not bound to a literal approach to interpretting the *Act*: see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). In the latter case, the Court stated:

> The ESA is remedial legislation. Consistent with s. 8 of the Interpretation Act, R.S.B.C. 1979, c. 206, the ESA should be given such fair, large and liberal construction as best insures the attainment of its objects.

Notwithstanding the training was undertaken by the Fire Academy, the original panel found sufficient reason to justify a conclusion that the individuals were, for the purposes of the *Act*, being trained by the City. These reasons included the degree of control the City exhibited over

admission to the Fire Academy, over matters of discipline arising during the training program and the City's continuing involvement in the training process - from admission to graduation. The City may quarrel with the extent and nature of their involvement in the training and take issue with whether or not that involvement should be characterized as being "a goodwill gesture", " in the spirit of cooperation" or "an intelligent business practice", but the fact of their presence and involvement in the training program remains real and undisputable.

In the context of the same argument, the City says the original panel erred in stating the Fire Academy was, "in effect" engaged as an agent of the City. Counsel for the City argues that the legal requisites of agency - consent of the agent and principal to the relationship, authority given to the agent to affect the legal position of the principal and control by the principal over the actions of the agent - are not present in the relationship between the Fire Academy and the City.

In reply to that argument, the Director says, *inter alia*, that taken in context the reference to the Fire Academy as being "in effect" the agent of the City can be ascribed no legal meaning, but ought to be taken as referring to the fact that the training of the City was done by the Fire Academy at the behest of the City. The individuals say the legal requisites of agency are present. They say actual or formal consent to the relationship is not an essential requisite but can be implied from the behaviour of the parties and there was sufficient evidence from which to imply such consent. They say the requisites of authority and control can also be implied and are often overlapping in the sense that the principal's control over the agent can be manifested in the authority given the agent. They argue the requisites of authority and control are also evident in the conclusions of fact made by the original panel.

We agree with both those arguments. First, we note that the original panel had also characterized the Fire Academy as a "surrogate" for the City just prior to its reference to the Fire Academy as being "in effect" an agent for the City:

> In the facts of this case, we are of the view that insofar as the training of firefighters is concerned, the Fire Academy is simply a surrogate for the City Fire Department. Thus, in effect, for the employees in question, their firefighting training was undertaken by the Fire Academy on behalf of Surrey. (page 9)

In our opinion, the characterization of the Fire Academy being engaged as either a surrogate or an agent is not essential to the conclusion reached by the original panel, which was that the individuals were employees and the City was their employer. Both comments were intended to describe, in a general way, the conclusion of the original panel that the City had sufficient control of the individuals and of the training program to be considered the employer for the purpose of that part of the definition of employee under consideration. It was not required that the panel find all the requisites of agency between the Fire Academy and the City in order to conclude the City should be considered to be the employer. The conclusion of the original panel that the Fire Academy had "in effect" been engaged as an agent for the City was a conclusion made in the context of interpreting the *Act*, not in the context of a proceeding before a court to determine the liability of a purported agent or principal at common law.

In any event, we find the requisites of a legal "agency" were present in the conclusions of fact made by the original panel. Consent to the relationship of principal and agent can be implied from a number of facts accepted by the original panel, including the involvement of the City in providing early curriculum guidance and teaching faculty, the continuing role played by the City in monitoring and advising on the curriculum, the respective roles of the City and the Fire Academy in the disciplinary process and the continuing feedback from the Fire Academy to the City on the progress of its recruits, which according to the City's principal witness was done by the Fire Academy "because they feel an obligation and a need to do so". The requisites of

authority and control can also be implied from the facts. Many of the matters referred to above also define the requisites of authority and control. As well, admission to the Fire Academy training program for the individuals was controlled exclusively by the City.

The City argues that the Fire Academy is precluded from being an agent of the City by reason of subsection 50(1) of the College and Institution Act, which says:

> "An institution is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government."

We do not accept that provision prohibits the finding of the original panel that, for the purposes of ensuring the objects of the *Act* are met, the Fire Academy can be found to be "in effect" acting as agent for the City.

This aspect of the application for reconsideration is also rejected.

Remedial Purpose, Public Policy and the Intent of the Parties

All the arguments advanced by the City under this heading were made before the original panel.

In our opinion, the overwhelming policy consideration in this matter is that employees are entitled to receive at least basic standards of compensation and conditions of employment from their employer. That is a statement of policy that the legislation says must direct the application and interpretation of the *Act*. We agree with the reference from *Machtinger v. HOJ Industries Ltd.*, *supra*, cited by Counsel for the City, that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

An interpretation of the *Act* resulting in a conclusion there was an employment relationship between the City and the individuals while the latter were being trained at the Fire Academy is consistent with the above policy consideration and reference. In effect, the City says the original panel should have subverted the statutorily mandated policy objectives in favour of a vaguely outlined public policy that would allow the City to facilitate the training of their fire department recruits outside of the protection and minimum requirements of the *Act*. This argument, even if it validly describes some acceptable public policy, simply suggests the original panel had the option of choosing between competing policy considerations. We cannot say the original panel erred in giving effect to the statutory policy objectives over the public policy espoused by the City. We would not second guess the decision of the original panel that the appropriate policy considerations, which they chose to give effect to, were those identified in the *Act*. The City has not shown, or even argued, that the policy objectives chosen by the original panel are incorrect or unjustified.

The City has not established any grounds upon which we should disturb the conclusion that the individuals were employees of the City. That result effectively disposes of the argument that effect should have been given to the "agreement" and intention of the City and the individuals that there would be no "employment" until the individual had graduated and met the other provisos set out in the letter referred to above. Section 4 of the *Act* prevents such an agreement be given effect:

> *4. The requirements of the Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

The City's "agreement" with each of the individuals contravenes the remedial purpose of the *Act* because it purports to defer commencement of the employment relationship and consequently denies employees minimum terms and conditions of employment.

Further Arguments

The City completes its reconsideration arguments by re-iterating its argument on the effect of the "agreement" between the City and the individuals, challenging the relevance of findings of fact and raising a new argument that the Director should have dismissed the complaints under section 76(2)(c) of the *Act* on the basis that they were not made in good faith.

In respect of the first matter, the nature of the "agreement" was fully argued before the original panel and we find no error with their analysis and conclusion. The simple response to this point, as we indicated above, is that once the City was found to be the employer of the individuals under the *Act* the "agreement" is of no effect.

On the second matter, the City says there is no relevance to the fact that the individuals enter the Fire Academy only on the recommendation of the City. No analysis is provided to support that assertion. Standing alone, it might be arguable that the fact of recommending the individuals to the Fire Academy has little or no relevance. However, the fact of recommending the individuals to the Fire Academy was only one part of the recruitment and training process that was found by the original panel to demonstrate a sufficient degree of control to justify the conclusion that the City was the employer of the individuals.

Finally, the City argues the Director should have dismissed the complaints at the outset under Section 76(2)(c), which gives the Director a discretion to refuse to investigate complaints that are *"frivolous, vexatious or trivial or [are] not made in good faith"*. There are two replies to this argument. First, this is an argument that should have been made on appeal. The Tribunal will not allow new arguments to be raised on reconsideration. Second, and in any event, the decision to refuse to investigate a complaint for reasons outlined in Section 76(2)(c) is a matter of discretion for the Director. The Tribunal will not interfere with that exercise of discretion. In *Jody L. Goudreau*, BC EST #D066/98, the Tribunal said, at page 4:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > . . . a general description of things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> > *Associated Provincial Picture Houses v. Wednesbury Corp.*, [1948] 1 K.B. 223 at 229
>
> Absent any of these considerations, the Director even has the right to be wrong.

This view has been adopted in *Takarabe and others*, BC EST #D160/98, which added the following comments:

> In *Boulis v. Minister of Manpower and Immigration* [(1972) 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant factors.
> (page 15)

The City has not shown, nor has it attempted to show, the Director exercised her discretion in a way that requires intervention by the Tribunal.

ORDER

Pursuant to section 116 of the *Act*, we order that the application for reconsideration be denied and the original decision confirmed.

David Stevenson,
Adjudicator
Employment Standards Tribunal

Mark Thompson,
Adjudicator
Employment Standards Tribunal

John Orr,
Adjudicator
Employment Standards Tribunal