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-

City of New Westminster
("the City ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 98/600

DATE OF DECISION: December 1, 1998

DECISION

This is a decision based on written submissions by H. Erlich, Barrister and Solicitor, on behalf of the City of New Westminster, and A. Adamic, counsel for the Director of Employment Standards.

At the time of filing the appeal, the City also sought a suspension of the effect of the Determination.As the Director undertook not to engage in enforcement action until the appeal was decided, the Registrar found it unnecessary to make a suspension Order.

OVERVIEW

This is an appeal by the City of New Westminster ("the City"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued August 24, 1998. The Director found that the City contravened Sections 10(1) and 21(2) of the *Act* in charging a fee for processing employment applications, and Ordered the City to pay $4,900.00 to the Director on behalf of the 98 individual applicants.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in her interpretation of Section 10(1) of the *Act.*

FACTS

The facts, as set out by the Director's delegate, were not disputed. They are as follows:

On Saturday April 18, 1998 and Saturday April 25, 1998 respectively, the *Vancouver Sun* and Victoria *Times-Colonist* newspapers published an advertisement for police officers for the New Westminster Police Service. The advertisement invited interested persons to submit their applications to the City for available positions. The advertisement also contained the following paragraph:

> "There is a non -refundable administration fee of $50.00 which is due and payable at the time your application is submitted. Cash only will be accepted."

On April 20, 1998 the Director's delegate discussed the advertisement with the Manager of Human Resources for the City. Following that discussion, the Director's delegate sent the Manager a letter advising him that charging a non refundable administration fee was contrary to Section 10 of the *Act*, and advising the City not to charge the fee.

The City indicated that it was proceeding with the advertisement, and sought a Determination on the matter. It stated that following the close of the posting, it would forward a list of the applicants who paid the fee to the Employment Standards Branch. That list was forwarded to the Branch on May 20, 1998.

Following a review of the City s submissions, the Director's delegate found that the fee was contrary to the provisions of Section 10 (1) of the *Act*. The Director s delegate found that the fee could not be justified on the grounds that it was a reasonable and justified means for off-setting costs and recovering associated expenses an employer might have in processing the job applications. The Director's delegate determined that the cost of renting rooms and screening applications was the employer's cost of doing business, not that of the potential employee.

The Director s delegate also found that the City was "off loading" the cost of recruitment to the applicants, thereby deriving an economic benefit at the expense of the applicants.

ARGUMENT

The City argued both before the Director's delegate and on appeal that Section 10 of the *Act* did not apply to the facts of this case. It contended that there was no payment for employing or obtaining employment, which is prohibited by the *Act*, but simply a payment for assessing the credential of individuals who responded to the advertisement, which is not a prohibited purpose.

The City argued that the *Act* contemplated that some payments are lawful as only those payments set out in subsections 10(1)(a) and 10(1)(b) are prohibited.

The City contended that subsection 10(1)(a) did not apply in this case because the City refunds the fee to the successful applicants. The City argued that Subsection 10(1)(b) did not apply because "there is no payment for providing information about employers seeking employees", merely for assessing credentials.

The City argues that the Director s delegate erred in concluding that the City was "indirectly" requesting payment, since the prohibited purpose of the payment did not exist.

The City also argued that Subsection 10(2) did not apply since it was directed not at persons seeking employment, but at employees. The City argued that because the Legislature did not include potential employees in this section, that category of persons were not within the purview of the *Act*.

The City states that it places successful individuals on an eligibility list, and extends offers of employment from time to time to persons on that list. The individuals do not become employees until they accepted the offer of employment.

The City argued that because it refunds the processing fee to the successful applicant, it could not be said that there was a payment for employment or obtaining employment. It denied that this practise constitued an attempt to circumvent the *Act*.

The City further argued that the Tribunal s decision in *International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the U.S. and Canada,(IATSE) Local 891* v. *Director of Employment Standards* (BC EST #D591/97) provides a complete answer to the practise of paying a fee for processing applications.

The Director argued that the position taken by the City was not "harmonious with the scheme and object of the *Act*, the intention of the Legislature and judicial authority...".

The Director submits that the advertisement is "the first stage of a process of vetting individuals for eventual employment" and must be considered as part of the employment process which is covered by the *Act.*

The Director notes that the City provides all applicants with an "application package" which includes and "official application form". The applicant is required to provide documents including medical forms. The City argues that this is the first stage in a a detailed hiring process, which is the precise process for which the *Act* prohibits the charging of a fee.

The Director argues that applicants, having fulfilled the requirements set out in the advertisment and the application package, individuals have not merely "submitted credentials for assessment" but in fact applied for a position with the City.

The Director further argued that the City acknowledged that successful applicants are placed on an eligibility list, from which the City may make offers of employment.

The Director suggests that the practise of refunding the fee to the successful applicant avoids a contravention of Section 10.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. After carefully considering the arguments of the City, I am unable to conclude that the Director s delegate erred in her interpretation of Section 10.

I am not persuaded that Section 10 should be read in the manner advanced by the City - that is, that the protections of the *Act* only apply once an employment contract has been entered into.

Section 10 falls under Part 2 of the *Act*, which contains prohibitions on hiring practises. It includes provisions which prohibit misrepresentation of positions, the employment of children under 15 years of age, or the payment, by an agency, to a person for obtaining employment for another person.

The objective of the *Act* is generally, to ensure that employees in British Columbia receive minimum standards for conditions of employment and compensation, and to promote fair treatment of employees and employers.

Because employment standards legislation is benefits conferring, it is to be given broad and general interpretation. (*Re Rizzov. Rizzo Shoes Ltd.* [1998] SCJ, 154 DLR (4th) 193).

Courts have repeatedly held that that employment standards legislation is to be given large and liberal interpretation (see *Fenton* v. *Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170, *Machtinger v. HOJ Industries* [1992] 1. S.C.R. 986). In *Rizzo,* The Court held that as employment standards legislation was a mechanism for providing minimum benefits, any doubts should be resolved in favor of the claimant.

In *Machtinger*, the Supreme Court of Canada set out interpretive principles of employment standards legislation:

> "....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 to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and a common law rights in the employment context is of fundamental importance." (at p. 1003)

Nevertheless, these interpretive principles need only be resorted to, where there is an absence of clear and express language. I do not find that to be the case here.

Section 10 states as follows:

> (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
>
> (2) A person does not contravene this section by requesting, charging or receiving payment for any form of advertisement from the person who placed the advertisement.
>
> (3) A payment received by a person in contravention of this section is deemed to be wages owing and this *Act* applies to the recovery of the payment.

The words of section 10(1) are mandatory and unambiguous. The *Act* provides protection in hiring practises to persons seeking employment, not just, as the City contends, persons who are already employees. The section prohibits a party from requesting or receiving, directly or indirectly, a payment for employing a person seeking employment.

Persons responding to the advertisements placed by the City are "persons seeking employment." The advertisement requires those applicants to pay a non refundable fee. It is irrelevant whether that fee is for assessing credentials in the words of counsel for the City, or for "renting interview rooms" and "administrating examinations , in the words of the City s Manager of the Human Resources. The fee is a payment for employing or obtaining employment for the person seeking employment. It is irrelevant whether or not the applicants are ultimately successful.

I agree with the Director that the practise of using funds collected from unsuccessful applicants to defray expenses of the hiring process is precisely what the *Act* is designed to prohibit, as it constitutes an employer s cost.

The Tribunal's decision in *I.A.T.S.E. Local 891* is distinguishable from this case.

In that case, the Union charged a $20.00 fee for processing permittee status applications. The Tribunal found that the fee was attached to union membership. The person paying the fee was not doing so on the belief that they would obtain employment, but for a consideration of their application for permittee status. The fee was not to obtain employment for a potential member or providing information about employers who may be seeking employees, which is prohibited by Section 10, but was rather a charge related to an individual's request to become a member of the Union. The Tribunal found that the fee was properly attached to union membership, was in compliance with the Union's constitution, and consistent with union practise.

ORDER

The Determination of the Director dated August 24, 1998 is confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal