

An Application for Reconsideration

- by -

AVT Audio Visual Telecommunications Corporation
("AVT")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/318

DATE OF DECISION: February 25, 2004

DECISION

SUBMISSIONS:

Gary Robb, Officer & Director for AVT Audio Visual Telecommunications Corporation
Keith Davel on his own behalf
Terry Walowina, E.S.O. for the Director of Employment Standards

OVERVIEW

This is an application filed by AVT Audio Visual Telecommunications Corporation (“AVT”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision to dismiss AVT’s appeal of a determination.

On August 18th, 2003, following an investigation, the Director’s delegate issued a determination ordering AVT to pay a total sum of \$40,4790.74 (the “Determination”). This latter sum included wages and section 88 interest payable to four former AVT employees (Keith Davel, Andrea Kennedy, Tanis MacSween and Sakis Zissopoulos) as well as \$1,500 on account of three separate \$500 administrative penalties.

AVT appealed the Determination to the Tribunal on two grounds, namely, i) the Director’s delegate erred in law; and ii) it had new and relevant evidence that was not before the delegate [see subsections 112(1)(a) and (c) of the *Act*]. The principal argument advanced by legal counsel for AVT was that the four complainant employees entered into a voluntary and lawful agreement to accept shares in lieu of their wages. In addition, AVT argued that the four employees were part of a “conspiracy” to assume control of AVT.

As noted above, Adjudicator Orr dismissed the appeal and confirmed the Determination (see B.C.E.S.T. Decision No. D328/03 issued on December 10th, 2003). Adjudicator Orr ruled that there was no evidence of any “conspiracy” by the employees and, in any event, that issue was not one that could be adjudicated by the Tribunal under the *Act*. With respect to the alleged “shares in lieu of wages agreement”, Adjudicator Orr concluded that any such agreement would be void by reason of the combined effect of sections 4, 17, 18 and 20 of the *Act*.

THE APPLICATION FOR RECONSIDATION

AVT’s request for reconsideration is dated December 17th and was filed on December 18th, 2003. AVT’s main argument is set out in “Schedule A” to the reconsideration application and is reproduced, almost in its entirety, below:

It is submitted that the Adjudicator erred in law. The Adjudicator relied on section 20 of the Employment Standards Act which states that all wages must be paid in Canadian currency as opposed to other goods or services including shares of a company.

Attached is a letter from AVT (Schedule “B”) to one of the applicants, Keith Davel, which formed part of the evidence yet was apparently not considered by the Adjudicator.

Note the following:

“You were hired on 14 January 2002. Till July 31 you were an employee of AVT and paid on a bi-monthly basis. As of July 31st you ceased to be an employee of AVT and worked as a contractor.”

The Adjudicator ignored the evidence in this case that AVT and the former employees in question agreed to take shares as compensation for future contract work being fully appraised [sic, appraised?] of the fact that AVT had no money at the time after the previous period of employment had ended due to lack of funds...It is submitted that the persons in question were no longer employees of AVT and were free to contract with AVT in the manner they saw fit having been fully appraised [sic] of AVT’s financial condition. It is contrary to the Canadian Charter of Rights and Freedoms to deny parties the right to contract as this would preclude a company such as AVT with no immediate funds from ever contracting into another form of agreement with a former employee. Again, the purpose of section 20 is to prevent an employer from unilaterally providing the employee with a form of compensation other than Canadian cash for salary.

It is also unconscionable that persons can rely on the Employment Standards Act to invalidate a contract that does not run afoul of the spirit and intent of the Act. Finally, the Adjudicator made no mention of cancelling the shares issued in lieu of cash consideration which is also unconscionable as the parties in question are effectively being remunerated twice for the same work.

The Director’s delegate did not make any formal submission regarding the merits of AVT’s application for reconsideration. However, in a submission to the Tribunal dated February 12th, 2004 (received February 16th, 2004), the Director’s delegate indicated that the amount payable under the Determination is incorrect since the section 88 interest component was erroneously included in the “wages payable to employees” and then added a second time as a separate item. In other words, the section 88 interest component was “double-counted”. Accordingly, the Determination, as now amended by the Director (see section 86 of the *Act*), directs AVT to pay a total sum of \$39,061.40 as of August 18th, 2003.

ANALYSIS

Although this application is timely (see *Unisource Canada Inc.*, B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel*, B.C.E.S.T. Decision No. D279/00), I consider it to be wholly devoid of merit. Indeed, it is very close to being frivolous. This application, for the most part, simply reiterates arguments that have been advanced and properly rejected in prior proceedings.

There is no evidence in the material before me to show that the complainants were truly independent contractors as and from August 1st, 2002. There are well-defined factors that differentiate an employee from an independent contractor and I do not see anything in the material before me that would justify concluding that any of the complainants were ever independent contractors. For example, AVT’s own documents show that the complainants continued to utilize AVT’s equipment to do their work after July 31st, 2002. Two other examples: i) Mr. Davel’s record of employment issued by AVT on October 29th, 2002 states that Mr. Davel and other staff agreed to “work for shares after July 31st, 2002”; ii) Athanassios Zissopoulos’ record of employment also issued on October 29th states that “the share deal was that he would receive 2 times as many shares in value *against wages* until the company could

repatriate the position by purchasing 1/2 of the shares back". In other words, it would seem that only the employees' method of remuneration changed after July 31st, 2002 (shares instead of wages) and not the fundamental nature of their duties and responsibilities.

I might also add that the employees apparently deny having ever formally agreed to change their status from employee to contractor or to accept shares in lieu of wages. However, this latter disagreement need not be resolved since, regardless of whatever agreements might have been made (and AVT's evidence on this latter score falls well short of proof on a balance of probabilities), sections 4, 17, 18 and 20 are a complete bar to the validity (and thus enforceability) of any such alleged agreements.

AVT's case does not, so far as I can determine, raise any *bona fide Charter* issue; indeed, I fail to see how the *Charter* would even apply in this case. AVT's submission is completely silent on this latter matter. AVT does not indicate what particular section of the *Charter* might be relevant nor is AVT's argument on this point supported by any legal authority.

Finally, it would not seem that the employees will be compensated twice over. The shares are seemingly worthless (the "issue price" appears to have been a number picked out of thin air--recall, AVT's own evidence is that the shares were issued because the company was in financial distress, if not crisis) and, in the absence of any public market for the shares, the shares can only be converted into cash through an AVT "buy back". However, if AVT wishes to have the various share certificates declared void then it should bring the appropriate application in the civil courts; this Tribunal does not have the statutory authority to issue any such order.

ORDER

AVT's application to vary or cancel the decision of the Adjudicator in this matter is **refused**.

However, in accordance with the Director's request I hereby order that the Adjudicator's Order be varied, pursuant to section 116(1)(b) of the *Act*, as follows (see underlined portion below):

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated August 18, 2003, and as varied by the Director on February 12th, 2004, is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal