Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Silver Screen Talent and Entertainment Inc.
("Silver Screen")

- 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: David B. Stevenson

FILE No.: 2003/2

DATE OF DECISION: March 27, 2003

DECISION

OVERVIEW

Silver Screen Talent and Entertainment Inc. ("Silver Screen"), seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D513/02, dated November 21, 2002 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director on August 8, 2002 and which had found Silver Screen had unlawfully deducted $26.75 from wages paid to Gordon Scott and ordered Silver Screen to pay Mr. Scott that amount. The original decision confirmed the Determination.

In his application for reconsideration, Silver Screen says the original decision is inconsistent with previous decisions of the Tribunal and the Director failed to establish jurisdiction over the complaint.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If we are satisfied the case is appropriate for reconsideration, the substantive issues raised in this application are whether the original decision is inconsistent with previous decisions of the Tribunal and whether the Director failed to establish jurisdiction over the complaint.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

> *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.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also be made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant

reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

ARGUMENT AND ANALYSIS

I find that none of the matters raised in this application warrant reconsideration. There is no inconsistency between the original decision and any other decision of the Tribunal. I agree entirely with the submission of the Director that the decision with which the original is argued to be 'inconsistent' is a completely different case on its facts than the instant case. The original decision, and the Determination, identified the key distinguishing factor in the following excerpt:

> . . . the alleged events of January 9th have absolutely no bearing on whether Silver Screen improperly deducted the amount in question from Mr. Scott's January 4th paycheque.

Silver Screen also argues in this application that the Director had no right to make any decision on the complaint because their licence application (issued under Section 38 of the *Employment Standards Regulations*) indicated a fee of $25.00 would be charged to cover the cost of photography and reproduction and, having granted the licence, the Director should not now be able to say such a deduction was improper. Whatever merit that argument might have generally, it is answered in the following comment from the original decision:

> . . . Silver Screen apparently concedes that no photograph was taken and that the $25 deduction ought not to have been made. It would appear that this $25 "fee" is charged to all Silver Screen clients as a matter of course as part of its "contractual" entitlement. Of course, any such contract must comply with section 38.1 of the *Regulation*, a point that seems to have escaped Silver Screen's attention.

On the jurisdictional issue, there is no indication that this issue was raised in the appeal. Notwithstanding, I can find no merit to the argument that Mr. Scott was not an employee, for the purposes of the *Act*, of the production company which hired him to work as an extra on the film "I Spy".

Silver Screen argues that Mr. Scott, like most, if not all, film extras, does not meet the common law definition of employee. The Tribunal has said on many occasions that common law tests, while a helpful guide, are not determinative of this issue when it is considered in the context of the definitions and objectives of the *Act*. The *Act* defines employee and employer in following terms:

> *"**employee**" includes*
> *(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;*
>
> *"**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;*

Both of those definitions are inclusive, not exclusive. The Act is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, 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.).__I agree with the following comment from *Machtinger v. HOJ Industries Ltd.*, supra, 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.

A significant number of the indicia of employment under the *Act* were present in Mr. Scott's relationship with the production company. Mr. Scott, like most other film extras, was employed by a production company on a temporary or casual basis. While engaged by a production company, that company exercised elements of 'control and direction' over him in respect of the work he did - he was told where to be, when to be there, what work was to be done and how that work was to be done (notwithstanding the direction might have been minimal); he was hired by and dismissed by the production company, through his 'agent', Silver Screen; he was paid by the hour, had no financial interest in the production and had no chance of profit or risk of loss in the production. He received wages for the work he performed. The agreements included in the argument made by Silver Screen are not determinative of Mr. Scott's status for the purposes of the *Act*.

This application is denied; the Tribunal will not exercise its discretion to reconsider the original decision.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D513/02, dated November 21, 2002, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal