BC EST #D118/99
Reconsideration of BC EST #D518/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of a reconsideration pursuant to Section 116 of the *Employment Standards Act*, R.S.B.C. 1996, C. 113

- by -

City of New Westminster

("New Westminster or employer")

- Of a Decision issued by -

The Employment Standards Tribunal
(The "Tribunal")

ADJUDICATOR: Paul E. Love , Norma Edelman, Kenneth W. Thornicroft

File No.: 98/791

Date of Decision: June 30, 1999

DECISION

OVERVIEW

This is an application for reconsideration, on written submissions from counsel, made by the City of New Westminster (the "City") in relation to Tribunal Decision D518/98. The Decision confirmed a Determination dated August 24, 1998 wherein the Delegate found that the City had breached Section 10 of the *Employment Standards Act* (the "*Act*") by placing of an advertisement calling for the payment of a $50.00 application processing fee.

ISSUE TO BE DECIDED

Does a $50.00 application processing fee violate Section 10 of the *Act*?

FACTS

The City of New Westminster placed an advertisement seeking applications for positions available for police officers. The advertisements placed in the Saturday April 18, 1998 and Saturday April 25, 1998 editions of the Victoria Times Colonist and Vancouver Sun 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 Delegate advised by letter that such an advertisement violated Section 10 of the *Act.* The City went ahead with the advertising and stated that at the close of the posting it would submit to the Delegate a list of applicants who paid the fee. That list was sent to the Delegate on May 20, 1998.

The Delegate issued a Determination on August 24, 1998, finding a violation of Section 10(b) of the *Act*, determining that the sum of $4,900.00 was due and payable to a number of applicants who applied for positions with the City. The Delegate also relied on Section 21(2) of the *Act* indicating that the expenses were part of the employer's business costs, and the employer could not require an employee to pay these costs.

ANALYSIS

The question in this case is whether an application fee solicited from all applicants for a position, is a hiring practice, which is forbidden by Section 10 of the *Act.* This section reads as follows:

> 10(1) A person must not request, charge or receive, directly or indirectly from a person seeking employment a payment for
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> (a) employing or obtaining employment for the person seeking employment, or
> (b) providing information about employers seeking employees.

The *Act* is intended to provide a measure of protection to all individuals engaged in the work force. Employment standards legislation has typically been given large, liberal and remedial effect: *Re Rizzo Shoes Ltd*, [1998] S.C.J. , 154 D.L.R. (4d) 193, *Fenton* v. *Forensic Psychiatric Services Commission* (1991), 56 BCLR (2d) 170, *Machtinger* v. *HOJ Industries* [1992] 1 S.C.R. 986. The *Act* forbids certain hiring practices including certain pre-contractual inducements, child labour, and regulates individuals who facilitate employment contracts (employment agencies, farm labour contractors). There is a specific section in the *Act* which applies to employment agencies (Section 11), who are not permitted to charge employees for their services. If the legislature had intended that the *Act* was to regulate only employment agencies with regard to employing or obtaining employment for persons seeking employment, Section 10(1) of the *Act* would be unnecessary and redundant.

Section 10 of the *Act* covers job applicants as well as those already employed and their employers. Further, those who purport to act as agents for either a prospective employee or employer are also subject to the strictures of Section 10. This section covers a "person seeking employment" as well as those who "provide information about employers seeking employees". Thus, Section 10 governs the conduct of any party purporting to assist an individual to obtain employment. Whether or not the job seeker actually obtains employment is irrelevant; either way the charging of a fee for assisting the job seeker is proscribed. Employers or others cannot charge for providing information about prospective employers, nor can a fee or payment be charged for "employing or obtaining employment".

It is our view that the costs of recruiting and selecting employees are ordinarily a cost of doing business for the employer. The appellant argues that Section 21(2) of the *Act* applies only once a person becomes an employee, and applies to matters such as a breakage or outage. We agree that Section 21 only applies once an applicant becomes an employee. Section 21 refers specifically to an employee as opposed to Section 10, which refers to a person.

A mandatory application processing fee charged to a job applicant is prohibited by Section 10 of the *Act.* In the present case, payment of the processing fee was a necessary precondition to obtaining employment with the City of New Westminster. While payment of the fee did not, in any fashion, *guarantee* that an applicant would be offered employment with the City, if the fee was not paid, the applicant's application for employment would not even have been considered. Thus, since an applicant could only succeed after having first paid the application fee, the fee was an indirect payment for obtaining employment.

Even though the City of New Westminster ultimately agreed to refund the fee – but only to successful applicants – that policy does not change the fact that the fee was demanded in the first instance as a condition of application. Further, the advertisement itself does not state that the fee will be refunded to successful applicants. Accordingly, when an individual determined whether or not to make the application in response to the advertisement, that individual would have to weigh the fact of the fee in their decision-making process. Some, otherwise worthy candidates, would be dissuaded from making the application by reason of the fee itself, which, for those individuals, constituted a financial barrier to access to the applicant pool. Obviously, such a barrier would have a disproportionate impact on lower-income individuals and the unemployed. That is the nub of the issue and the policy behind Section 10. The harm associated with job application fees is that such fees, to some degree, determine who will or will not apply for a position and thus create barriers, particularly to the financially disadvantaged.

The appellant relies on the decision *of I.A.T.S.E., Local 891*, BC EST #D581/97. That case involved a union charging an application fee for membership in the union.

I.A.T.S.E. is distinguishable on the facts from the present case. In this case the application fee was solicited by the City in connection with its solicitation of applicants for employment. I.A.T.S.E. dealt with the imposition of a fee for evaluating a person's credentials for union membership. A union is entitled to charge a fee for membership in the union. A person who believes that such a fee is unfairly imposed has a remedy pursuant to the Labour Relations Code. We therefore find that the application processing fee in this case violated Section 10 of the *Act.*

ORDER

Pursuant to Section 115 of the *Act*, we order that the application for reconsideration is dismissed.

Paul E. Love
Adjudicator
Employment Standards Tribunal

Norma Edelman
Acting Chair
Employment Standards Tribunal

Kenneth W. Thornicroft
Adjudicator
Employment Standards Tribunal