EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

City of Surrey

("City" or "employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/781

DATE OF DECISION: April 12, 1999

DECISION

OVERVIEW

This is an application by the City of Surrey ("City") for reconsideration of a Decision confirming a Determination that certain persons attending at the Justice Institute Fire Academy ("Fire Academy") were employees of the City. The appeal to the Tribunal and reconsideration application to the Tribunal proceeded on written submissions made by Adam Albright, counsel for the City of Surrey, and Allen Black, counsel for the Surrey Fire Fighters Association, Local 1271 (the "Association"). The City failed to demonstrate any basis for a reconsideration of the Decision.

ISSUE TO BE DECIDED

Are the persons attending training at the the Fire Academy, the employees of the City of Surrey during the training period?

FACTS

This is an application for Reconsideration of a Decision issued on October 30, 1998. The Adjudicator confirmed a Determination issued on April 30, 1998 which held that 32 persons attending the Justice Institute Fire Academy ("Fire Academy") were employees within the meaning of the *Act*. Lengthy written submissions were made by counsel for the City on December 10, 1998 and for the employees on January 28, 1999. The amount in issue in this matter is $204,793.90.

The Delegate found the following facts:

> The Complainants were required to attend a 12 week training program at the Justice Institute of B.C The program operates for 5 days of each week. Some of the complainants paid for the cost of the course and were not reimbursed by the employer. Some of the complainants were required to pay for boots and special clothing which was not reimbursed by the employer. The Fire Academy operates a training program, and the instruction is provided by Academy employees. The City does not pay the Academy employees, while they instruct recruits. The recruits are sent for training at the Academy. The Delegate found that there was nothing to distinguish the 32 complainants in this complaint from the 24 complainants dealt with in two earlier decisions of the Tribunal.

The Delegate found that all 32 individuals were employees within the meaning of the *Act* and were entitled to the following:

The minimum wage of $7.00 per hour for all hours worked while being trained;

Reimbursement for course fees, boots and special clothing;

Overtime pay for hours worked over 8 in a day and 40 in a week, if any;

Pay for statutory holidays while being trained, if any;

Vacation pay at the rate of 4 % on the wages earned while in training;

Interest as per section 88 of the *Act.*

The Delegate made his Determination on the basis of information provided by the complainants and their legal counsel, as the employer failed to participate in the investigation.

The Tribunal refused to allow arguments to be made on the issue of agency, relying on earlier decisions of the Tribunal in *John Ladd's Imported Car Company*, BC EST #D313/96 and *Tri-West Tractor Ltd.*, BC EST #D286/96. The Tribunal was not prepared to allow the employer to make the case on appeal, that it should have advanced before the Director's delegate. The Tribunal stated that the legal issues were disposed of by the Tribunal in *City of Surrey*, BC EST #D077/98 and *City of Surrey*, BC EST #D433/98, (reconsideration BC EST #D411/97) and found no basis for the appeal.

The Tribunal confirmed the finding of the Delegate that there was nothing to distinguish the group of complainants from earlier groups of complainants.

ANALYSIS

I am asked to reconsider whether trainees at the Fire Academy are, for the purposes of the *Act*, employees of the City of Surrey during the training program. This question was answered affirmatively by the Delegate and by the Tribunal in its original decision. In a reconsideration application the burden is on the party seeking reconsideration to establish that there is a breach of the rules of natural justice, a significant error of fact that is clear on the face of the record, or that there is 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: *Zoltan Kiss*, BC EST #D479/97.

It is not the "job" of the Tribunal on reconsideration to find facts and to substitute its opinion for that of the earlier panel. Counsel for the Association has submitted that this Tribunal should not consider facts beyond those established in the record. I agree that this is a proper approach to take upon a reconsideration application.

Having set out the test, I will consider each element of the test in relation to the case advanced by the employer on reconsideration.

Breach of Natural Justice:

The employer argued that there was a breach of natural justice by the Adjudicator because the Adjudicator failed to consider an argument that the Fire Academy was not in law an agent of the City. The City relies on *Rescan Environmental Services Ltd*, BC EST #D522/97. I accept that generally a failure to consider evidence or argument advanced in the first instance can be a breach of natural justice, and is a basis for an Adjudicator to vary or cancel a Determination.

The employer attempted to advance at the Tribunal hearing arguments related to agency. These agency arguments were also advanced to this Tribunal on reconsideration. These were similar arguments that the City had advanced, unsuccessfully, in earlier cases before the Tribunal: *City of Surrey* BC EST #D433/98 . In my view the Tribunal correctly took the view that since this argument was not advanced to the Delegate, it should not be advanced before the Tribunal, applying the principles set out in *Tri-west Tractor Ltd.*, BC EST #D268/96.

In my view the employer has not demonstrated that there was a breach of the rules of natural justice. The employer was given an opportunity to participate in the investigation by making submissions, and apparently chose to make no submission. It had made submissions in earlier cases involving similar issues: *City of Surrey*, BC EST #D077/98 and *City of Surrey, BC EST #D411/97*. It is not an error for the Delegate to fail to consider matters, which were not placed before him by a party. If the Delegate took into account matters which were not placed before him by the parties, that might be a breach of natural justice, justifying an intervention by the Tribunal.

I have considered the merits of the "agency argument" advanced by the City. In my view, the "agency argument" is of little assistance in resolving the issue of whether the attendees at the Academy are employees of the City of Surrey. Whether or not there is an agency is not the issue in this case. The issue is whether the Fire Academy is training firefighters for the business of the City of Surrey. The common law concept of agency is useful to determine whether there should be remedial consequences imposed on a principal for a promise or contract made by an agent to a third party. The concept, however, is not of assistance in determining whether a trainee is an employee. Employees can be trained by trainers, within or outside an organization. The trainers need not be agents of the City, in order to find that the recruits were being trained for the employer's business.

Error of Fact:

I am not persuaded that any significant error of fact was made by either the Delegate or the adjudicator. The Delegate, as did the Adjudicator, make certain findings of fact, and applied the law to those findings of fact. Part of the body of law applied were decisions made previously by the Tribunal. The Delegate does not appear to have imported evidence tendered in an earlier proceeding and used that evidence to make findings of fact in the present case.

New Evidence:

The employer is not tendering any new evidence which was unavailable at an earlier time.

Inconsistency in Tribunal Decisions:

The employer has not raised any inconsistency between the decision in this case and any other decision of the Tribunal. It appears that the only issue being raised is whether there was an error in law. If this Tribunal were to rule in favour of the employer, that ruling would be inconsistent with earlier decisions of the Tribunal on substantially similar facts. The Association has referred in argument to the Thompson report, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia.* In my view, one of the purposes of establishing a Tribunal which is required to give decisions in writing is to ensure that there is consistency in decision making, and that the decisions contribute to the statutory purpose of the *Act* to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. A significant departure from the decisions of the Tribunal, without, some serious difference in principle, cannot be said to promote fair and efficient dispute resolution.

Fundamental Error of Law:

The employer focusses on s. 1(1) of the *Act* and argues that the persons attending firefighting instruction are not employees because they are not a person being trained by an employer for an employers's business. The employer says that prior to 1994 such persons would have been employees because they were trained in house by the City. The employer says that there are not employees because:

a) the contract between the parties is that the City will offer employment to the person, if and when that person successfully completes the firefighting program at the Fire Academy. There is no contract of employment, but a condition precedent to a contract of employment;

b) there is no obligation on an employee to accept a position with the City following successful completion of the program;

c) there is no evidence that an attendee is under the direction or control of the City while taking training at the Academy; and

d) that the relationship between the Academy and the City is not one of agency.

Counsel for the Surrey Firefighters Association, Local 1271 on behalf of the 32 employees, submitted that the Tribunal ought to follow its previous decisions in *City of Surrey*, BC EST #D411/97 and BC EST #D077/98. The Association's counsel says that the facts are not different in any material way from the earlier decisions of the Tribunal. The Association says that there is a close connection between the Academy and the City. The Association says that the mere fact

that the City choses external training of its recruits, as opposed to in-house training, does not alter the fact that the City trains firefighters. The City apparently makes the decision as to who will be trained and hired before the training commences. There is no separate interview to select applicants from among trained candidates for hiring, after the course is finished. The City has input into the course content.

I am persuaded that the Tribunal and the Delegate did consider the germane facts in concluding that the attendees were, in law, employees of the City. This decision appears to have been correct in law as:

a) there is a close relationship between the Academy and the City of Surrey;

b) the Academy trains only sufficient numbers of firefighters to meet the needs of the City of Surrey and other employers of fire fighters; and

c) the City hires all the firefighters that are sent for training, without a secondary interview where it assesses the qualifications of applicants. It makes that assessment before the applicant proceeds to training.

In my view this matter can be resolved without the need to resort to concepts such as agency. Whether firefighters are trained by internal trainers, or external trainers it strains credulity to suggest that these individuals are not being trained by an employer for the employer's business.

If the Academy were an educational facility that enrolled students, and had control over the numbers of students admitted, and the type of training offered, the City's argument could have some merit. In the present case all the students being trained, are being placed, and the employer appears to have substantial control over who is being admitted, the training administered and the placements made. This case is not the same as an employer who says, come and talk to us about employment after you finish your diploma. The Academy does not have an open admissions policy; it does not train students irrespective of market demand, as would an independent education facility.

I am satisfied that the adjudicator did not err in law in concluding that the trainees attending the Fire Academy were employees being trained for the employers business.

ORDER

Pursuant to Section 116 of the *Act*, I order that the Decision made in this matter BC EST #D488/98 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal