TRINIDAD AND TOBAGO
ESD NO. 74 OF 2002

IN THE INDUSTRIAL COURT

Between

BANKING, INSURANCE AND GENERAL WORKERS' UNION	- PARTY NO. 1
And	
TRI-STAR (LATIN-AMERICA) LIMITED	- PARTY NO. 2
SOUTH WEST REGIONAL HEALTH AUTHORITY	- PROPOSED PARTY NO. 3
TOBAGO REGIONAL HEALTH AUTHORITY	- PROPOSED PARTY NO. 4

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CORAM:

Her Honour Ms. E.J. Donaldson-Honeywell	- Chairman
His Honour Mr. V.E. Ashby	- Member
Her Honour Mrs. J. Rajkumar-Gualbance	- Member

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APPEARANCES:

Mr. D. Devenish Assistant General Secretary	) for Party No. 1
Ms. I. Ramoutar-Liverpool Attorney-at-Law	) for Party No. 2
Mr. K. Harrikissoon Attorney-at-Law	) Proposed Party No. 3
No appearance	) Proposed Party No. 4

DATED: JANUARY 23, 2007

JUDGMENT

Delivered by Her Honour Ms. E.J. Donaldson-Honeywell

This Trade Dispute reported on November 18, 2002 concerns the "demotion and reduction in salary of Mr. George Hazel", an Emergency Medical Technician **[EMT]**. The said action; which was disciplinary in nature, took place on November 11, 2002. Mr. Hazel **["the Worker"]** was relieved of "operations supervisory responsibilities" as Team Leader in a Pilot Project initially intended to be completed in six (6) months. It was known as EHSTT and was implemented in the South West Health Region. As a result of the said action, seen by him as a demotion, his gross total compensation of $6,500.00 was reduced by $2,965.00.

Initially the Bank Insurance and General Workers' Union **["the Union"** or **"Party No. 1"]** claimed reinstatement of Mr. George Hazel in his former position without loss of salary and benefits plus damages in the sum of $10,000.00 for hardships inflicted on him. Mr. Hazel, who had continued to work in the demoted position left the Emergency Health Services in September 2005 to take a position, as Lecturer at the Emergency Training Institute. The Union therefore at the close of its case claimed compensation in the amount of the said salary reduction for the full thirty-six (36) months he worked in the demoted position, instead of reinstatement.

In the hearing of this dispute the Court was not presented with any challenge to the Union's contentions that:

- "There was no basis to justify the demotion of the Worker and consequential reduction of his salary.
- The Company did not give the Worker an opportunity to be heard nor was he provided with the relevant information before the decision was made to demote the Worker.
- The Company acted contrary to an implied term of the Worker's employment contract to act in good faith towards him.

- The Worker experienced undue hardship as a result of the cut in his salary of approximately $3,000.00.
- The actions of the Company were harsh, oppressive and not in keeping with the principles and practices of good industrial relations."

Instead, the only issue in dispute for the Court's determination was as to the true identity of the Worker's employer. Tri-Star (Latin-America) Limited **["the Company"** or **"Party No. 2"]** denied at the outset that there was an employment relationship between the Company and Mr. Hazel, since Mr. Hazel was a Tobago Regional Health Authority **["TRHA"** or **"Proposed Party No. 4"]** employee when recruited into the Pilot Project.

As Tri-Star (Latin-America) Limited ceased involvement in the EHSTT Pilot project in December 2002 the question also arose as to whether the South West Regional Health Authority **["SWRHA"** or **"Proposed Party No. 3"]** in taking over the operation at that time, became Mr. Hazel's employer.

Questions, such as those arising in this dispute, have increasingly raised concerns in the globalized evolution of good industrial relations practices. The most recent General Conference of the International Labour Organization, met on May 31, 2006 to consider inter alia:-

> "the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship ....."

It was decided that international guidance to members was required in achieving inter alia, protection for workers where contractual arrangements in certain situations

would otherwise have the effect of depriving them *"of the protection they are due"*. The resulting International Labour Standard adopted by the ILO Conference was R 198 Employment Relationship Recommendation, 2006.

The Court, in determining the employment relationship issues raised herein, does so in accordance with Section 10 (3) (b) of the Industrial Relations Act Chapter 88:01.

We are thereby required to:-

> "act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations".

In so doing the ILO recommendation referred to above, as well as other international and local precedents, can be considered and applied to the factual circumstances before us with a view to deciding whether the Worker is entitled to protection within an employment relationship.

The Issues

(1) Did Tri-Star Latin America assume the status of employer in relation to the Worker over the period June 2000 to December 2002?

(2) In the alternative did the Worker remain employed by the TRHA and/or the SWRHA over the period June 2000 to December 2002?

(3) Can the SWRHA be deemed a successor employer from January 2003, liable to the Worker for the reduction in salary?

Procedural History

As a prelude to outlining the relevant factual matrix and analyzing the relationships between the parties to determine the issues identified, the procedural steps which

led to our consideration of these issues are of some interest. The dispute was first fixed for hearing before the current panel of Judges, on March 17th, 2006. Prior to that date a number of directive orders were made under the chairmanship of then Chairman of the Essential Services Division, His Honour Mr. C. Bernard, after the dispute was referred to the Court by the Minister on February 27, 2003.

On April 11, 2003 parties were directed to file written Evidence and Arguments on or before May 29, 2003 and hearing was scheduled for September 15, 2003. The Company applied for and was granted an extension of time to June 13, 2003 to file but failed to do so before the September 15, 2003 hearing date. There was also no appearance for the said Company on that hearing date.

Subsequently, the Company was represented at a January 27, 2004 Hearing fixture. It was on this date that Counsel for the Company raised as a preliminary issue the question whether the Worker was employed by the Company. Although the Union had filed Evidence and Arguments there was still no filing by the Company. The Chairman then directed that each party file Evidence and Arguments on the newly raised preliminary point. Both parties complied. There were however hearing dates thereafter adjourned when the Company failed to have a representative appear on its behalf. Eventually, when the hearing commenced on March 17, 2006 the written statements of Evidence and Arguments on file were as follows:-

Evidence and Arguments of Party No. 1 filed June 13th, 2003.

Supplemental Evidence and Arguments of Party No. 1 filed June 7th 2000.

Evidence and Arguments of Party No. 2 on Preliminary Issue filed on 25th February, 2004.

Supplemental Evidence and Arguments on Preliminary issue filed by Party No. 2 on March 15, 2006.

Supplemental Evidence and Arguments on Preliminary issue filed by Party #2 on March 24th, 2006.

There had been no direction of the Court authorizing the latter two filings, however an unopposed application by Party No. 2 ratifying the said filings was granted on day two (2) of the hearing that is March 27, 2006.

Submissions commenced regarding the preliminary point, whereupon it became clear to the Court that the preliminary point turned on factual credibility issues best determined based on oral testimony, duly exposed to cross-examination. It was therefore directed that the full hearing of substantive issues in the dispute proceed wherein Party No. 2 would be afforded the opportunity to prove its contention that it was not the Worker's employer.

The hearing proceeded with oral evidence from two (2) witnesses. They were the Worker, for the Union and Mr. Ian Bertrand a Director, for the Company. On conclusion of the oral evidence, the cases for both parties were closed. At this stage the Court, not having been presented with sufficient information to fully enquire into the preliminary issue raised denying the Company's status as Employer, issued a direction intended to fill this void. As Tri-Star (Latin America) Limited had submitted orally and led evidence that the Regional Health Authorities were at all times the Worker's employer; the Court's order made on October 10, 2006 was as follows:-

UPON HEARING the Submissions of both parties on the Preliminary Point raised by Party No. 2 that it acted in the capacity of an agent and was not the employer of the Worker **GEORGE HAZEL.**

UPON HEARING the evidence that in January 2003 the South West Regional Health Authority succeeded as the employer.

UPON HEARING the Representative of Party No. 1, the Attorney at Law for Party No. 2 and the Attorney at Law who is observing the proceedings on behalf of the Emergency Medical Services.

IT IS DIRECTED

THAT a notice be served on the Tobago Regional Health Authority and the South West Regional Health Authority that the Industrial Court intends to determine whether the said Authorities should be joined as parties to this Trade Dispute pursuant to sections 11 (b) and 19 (2) of the Industrial Relations Act, Chapter 88:01.

IT IS ALSO DIRECTED

THAT on or before the 13th day of October, 2006 Party No. 2 do serve directly on the said Authorities all copies of the documents which were filed in this Trade Dispute including the Verbatim Notes of Evidence which were given prior to the 10th day of October, 2006.

THAT on or before the 20th day of October, 2006 Party No. 2 do serve directly on the said authorities a copy of the Verbatim Notes of evidence in this Trade Dispute which were given on the 10th day of October, 2006

IT IS FURTHER DIRECTED

THAT on or before the 30th day of October, 2006 the said Authorities do file six (6) copies of Affidavits with the Court and serve one (1) copy directly on Party No. 1 and Party No. 2 detailing defenses and/or admissions with regard to the following:

(i) The evidence that from June 2000 to January 2003 Party No. 2 acted as an agent for the Regional Health Authorities and/or that the South West Regional Health Authority succeeded Party No. 2 as the employer in January 2003.

(ii) The Substantive claim by Party No. 1 that the Worker was demoted in circumstances not in keeping with the Principles of good Industrial Relations Practices."

Counsel for the Company expressed some reservations about this direction, particularly as the Court indicated that it was the Company's responsibility to ensure that the proposed Parties No. 3 and No. 4 were provided with the relevant documents to inform their response to the issues raised.

The Court therefore reiterated as follows:-

> "the purpose of this direction is really to allow for us to give full consideration to the point raised by Party No. 2. In other words, it is to ensure that no information is overlooked that may be relevant to the point that you have raised."

Counsel was further advised by the Court on October 10, 2006, as follows:-

> "If, however, it is that you do not wish to proceed with the position that you have taken in which you said the Employer is, in fact, only acting as agent, there is no need for any of this information and you need not furnish it to the Court."

Ultimately Proposed Parties 3 and 4 were afforded the opportunity to participate in the hearing. Proposed Party No. 4 filed no Affidavit and failed to appear. Proposed Party No. 3 however, filed an Affidavit on November 23, 2006 and written submissions on November 29, 2006.

Thereafter an oral closing address was delivered by the Union's representative following which the Company's Counsel opted to make its closing address in the form of a written submission filed on December 4, 2006. Reservation of Judgment was delayed to December 14, 2006 to allow for the Union to respond if necessary.

Alleged Factual Matrix

The written and oral evidence on the manner in which the Worker was demoted came only from the Union and was not challenged in Cross-Examination. The evidence as stated in the June 13, 2003 filed Evidence and Arguments underscored the following events:-

> "5. In or around September 2002 the management held discussions with the Worker over the manner in which he spoke to persons. (Exhibit 2)." [The reasons stated related to the manner in which the Worker allegedly spoke to persons].

6 The Worker accepted the assistance offered under the employees assistance programme and to meet with Mr. Frank Dolly and Associates.

7. The Worker met with Mr. Frank Dolly and received guidance and instructions on how to deal with difficult situations that he may encounter while carrying out his duties.

8. The meeting ended with the worker agreeing to practise the techniques given to him by Mr. Frank Dolly and to return if he encountered any problems. No further meetings were scheduled.

9. On November 11th 2002, the Worker was summoned to a meeting with the Chief Operations Officer, Ms. Karla Reid.

10. At the meeting the Worker was informed that he was demoted with immediate effect to the position of Emergency Medical Technician –B and as a consequence his salary was reduced to $3, 535.00 per month.

11. The Worker requested the reasons for his dismissal and was told that he would receive written communication as to the reasons for his demotion.

12. The Worker followed up his verbal request with a written request by letter dated November 14th 2002 and addressed to Ms. Karla Reid, Chief Operations Officer. However, the Worker did not receive any response. (Exhibit 3).

13. By letter dated November 11th 2002 and signed by Ms. Karla Reid and which was only given to the Worker in January 2003, the Worker was informed of the reasons for management's decision to demote him. (Exhibit 2)." [The reasons stated related to the manner in which the worker allegedly spoke to persons].

On the status of the Worker's relationship with Tri-Star (Latin-America) Limited, the Union's contention was that "The employment relationship establishes a legal link between a person called "the employee" or "worker" and another person called "the employer" to whom he provides services under certain conditions in return for remuneration." In keeping with this position the Union contended and led evidence to establish that the conduct of both Tri-Star (Latin-America) Limited and the

Worker towards each other was such that the said Company ought to be deemed the employer of the Worker.

The first incident of such conduct was in the recruitment process for the EHSTT Pilot Project. Mr. Hazel testified that he was initially employed as an EMT by the TRHA by a written one-year contract commencing November 1, 2000. In November 1999, a recruitment meeting was convened with a Director of Tri-Star [Latin America] Limited, Mr. Ian Bertrand. He told the TRHA staff about a contract to manage Emergency Health Services as a Pilot Project which was due to be awarded to Tri-Star (Latin America) Limited. He invited staff to apply to the Company for positions in the Pilot Project.

Thereafter, the conduct evidencing an employment relationship continued with the Worker applying by letter to the Company for a position in the Pilot Project. On June 23, 2000 the Worker was invited to accept a position in the Pilot Project with responsibilities additional to those he then carried out. The letter was signed by Mr. Ian Bertrand as Director, on the letter-head of another Company known as Emergency Health Services [EHS] Limited. However, the parties to these proceedings all agreed that this was a Company that had been created to operate the Emergency Health Services but this purpose never materialized. Tri-Star (Latin America) Limited continued as far as the Worker was aware to manage the EHSTT project as his employer and the Worker said he viewed Mr. Bertrand as having written to him as Director of Tri-Star (Latin America) Limited. Mr. Bertrand invited him to assume duties no later than July 10, 2000.

In continuation of the conduct reflecting this employment relationship the Worker testified that shortly after being recruited to the Pilot Project he was contacted by Tri-Star (Latin-America) Limited and asked to fill out a TD1 form [a form required for income tax purposes] reflecting Tri-Star (Latin-America) Limited as his employer. He had resigned from the TRHA to take up the new position, so he signed the form with the new employer. Thereafter his salary of $6,500.00 was paid by Tri-Star (Latin America) Limited. Copies of TD4's [another form required for income tax purposes] for the years 2000 to 2002 with the said Company as Employer were entered into evidence through the Worker.

As further evidence of the employment relationship the Worker testified that Mr. Bertrand in his capacity as Director, Tri-Star (Latin-America) Limited gave him instructions and assignments. The Worker's evidence was that although Tri-Star (Latin-America) Limited was the employer, the name of the Pilot Project was EHS Trinidad and Tobago [EHSTT]. This title was a name only, which appeared on the letterhead of the November 11, 2002 letter confirming his demotion. The Worker was aware of the fact that the Pilot Project had no legal personality such as that of a registered company. He saw it merely as a project managed by Tri-Star (Latin-America) Limited. Thus, although only the name EHSTT was indicated on the demotion letterhead, the employer actually responsible for his demotion was the Company whose functionary had recruited him and which paid for his services.

The Worker testified that the loss in salary occasioned by his demotion caused hardship, in that he was forced to curtail a course of studies, find accommodation at reduced rental cost and restructure loans, thereby paying additional interest for an

extended period. Having had the opportunity to observe the delivery of his evidence in a forthright manner, which was not shaken under cross-examination we found the Worker a credible witness.

The written statement of Evidence and Arguments of the Company denying Employer status was more comprehensively detailed by its sole witness, Mr. Bertrand. The Court thereby was apprised of the position of the Company within a virtual labyrinth of organizations, each involved in the EHSTT Project. These entities included:-

(a)	The Inter-American Development Bank	-	Source of funding
(b)	The Ministry of Health	)	
(c)	Canada Commercial Corporation	) -	Government to Government partners in the project
(d)	Tri-Star Industries Limited	-	A Canadian Company
(e)	Emergency Health Services Limited	-	A local Company with Bertrand as a Director
(f)	El Perial Management Services	-	A trade name for Mr. Bertrand
(g)	Executive Support Services	-	A trade name for a payroll service provided by Margaret Chase

Mr. Bertrand admitted that Emergency Health Services Limited, the Company named in the letter he used to recruit the Worker, was not involved in the Pilot Project at that time. Likewise, he confirmed that the entity named in the demotion letter, EHSTT; was not legally incorporated. He did not put forward as the Company's case that

either of these two (2) entities was the employer of the Worker. Instead the evidence led was that the Worker remained at all times in the employ of the Regional Health Authorities. [RHA's]

The status of the Company was not, according to Mr. Bertrand, that of employer of the Worker or any other Pilot Project Staff. He said the Company was merely the agent of a Canadian Company with a similar name - Tri-Star Industries Limited. He explained that it was this latter company that had been contracted, as executing agency, by the Government of Trinidad and Tobago in the EHSTT Pilot Project. The Pilot Project operational management team, including the person signing the Worker's demotion letter were all, he said, Tri-Star Industries Limited employees from Canada.

Two (2) letters from Tri-Star Industries Limited to the Company dated August 10 and 24, 1999 respectively, were entered into evidence through Mr. Bertrand to prove that the Company's role was primarily that of a collection and disbursement agent for the Canadian Company. He said that in fulfilling this role, the Company paid salaries to EHSTT Pilot Project Staff but was expressly excluded from any management responsibility. The Canadian Company undertook to indemnify Tri-Star (Latin America) Limited for any risk associated with the assignment.

This payment arrangement had to be introduced when according to Mr. Bertrand, the Regional Health Authorities no longer wanted administrative responsibility for the EMT's. Mr. Bertrand testified however that the RHA's, though no longer directly

involved in the payment process, dictated the formula for salaries. No RHA witness was called by the Company to substantiate these payment arrangements.

Mr. Bertrand maintained that despite the new payment arrangement, employment contracts for the EMT's were always drawn up with the RHA's as employer. Two (2) such contracts with the Worker were entered into evidence. Those contracts did not however, cover the period November 2000 [when the TRHA contract term ended] to December 2002 [after which a new SWRHA contract commenced]. Accordingly, there was no written RHA contract presented to the Court to contradict the Worker's evidence on the period when he was employed by the Company.

In addition to evidence from the parties, the Court also considered the affidavit evidence filed by proposed Party No. 3. This evidence in no way corroborated the case for Party No. 2 that the SWRHA was, prior to 2003, the Worker's employer.

In a written submission Counsel for the SWRHA pointed out that Party No. 2 "has provided no evidence either orally or documentary to show that the Worker was employed by the Authority under a valid contract of employment at the material time, that is the 11th day of November, 2002."

Mr Bertrand's evidence on the recruitment process was that he did in fact meet with TRHA staff in 1999. He denied however that he then represented himself as recruiting on behalf of Tri-Star (Latin America) Limited. He said he would have told the staff that he represented the Canadian Company - Tri-Star Industries Limited;

since in his personal capacity trading as El Perial Management Services, he was providing project management services for the said Canadian Company.

He said the Worker must have confused the names of the companies in alleging that he expressly spoke to the TRHA staff on behalf of Tri-Star (Latin America) Limited. He admitted candidly that "one of the mistakes, with hindsight, was that there were too many entities with the same basic name and therefore, people started talking about Tri-Star and not being able to differentiate between Tri-Star Industries and Tri-Star (Latin-America) Limited. I think it was clouded by the fact as well that Tri-Star (Latin-America) Limited was a disbursement agency and I guess people probably associated the Company ..... that where they got their funds was the Company which had control."

Mr. Bertrand admitted that the Worker and other EMT's were probably neither told explicitly that Tri-Star (Latin-America) Limited's role was merely that of an agent nor were the principals disclosed. The Court also observed that the letters setting the limits to Tri-Star (Latin-America) Limited's role were not copied to the Worker. There was no evidence that he had been informed.

The evidence led by both the Union and the Company consistently established that Tri-Star (Latin-America) Limited's involvement in the EHSTT project whether as an employer or merely a disbursement agent, ended on December 31, 2002. Thereafter it was alleged that the EHSTT operations were taken over by the SWRHA. The Worker was from then on employed under a written contract with the SWRHA signed in July 2003 but backdated to January 2003.

In written submissions it was underlined however by Counsel for the SWRHA that no evidence had been presented that the Authority in January 2003 on employing the Worker became a successor in the Industrial Relations Context as explained by the Court in Communications Workers Union and Amalgamated Manufacturers Limited, Application No. 1 of 1988. There was, Counsel indicated, no evidence that his clients

(a) carried on substantially the same business as previously;
(b) carried it on in substantially the same way; or
(c) carried it on with substantially the same employees.

This denial of sucessorship was supported by an affidavit.

There was no application made by any party to cross-examine the SWRHA's deponent so the evidence filed therein denying successorship remained unchallenged. Additionally, on the successorship issue, the Union admitted it had no material documentation to assist with the question whether SWRHA was a successor.

In these circumstances and based on legal submissions detailed persuasively and with clarity in Counsel for the SWRHA's written submission, the Court on November 30, 2006 ruled that there was no basis for joining the SWRHA as a party pursuant to Section 11 (b) or 19 (2) of the Industrial Relations Act and/or for a holding that the said organization be required to compensate the Worker. The third issue herein above identified was thus determined on November 30, 2006.

Analysis of Remaining Issues

The issues remaining for determination concern the denial by the Company of its status as Employer. Of particular relevance is the period June 2000 to December

2002 when the Company alleged that the Worker remained employed by the RHA's. The Court in considering the remaining issues took into account the Union's oral closing submissions and the Company's written submission.

Counsel for the Employer submitted, based largely on Common Law precedents governing the traditional dichotomy between "employee and "independent contractor;" that there was no employment relationship between her client and the Worker. Counsel argued that "simply to tender pay slips"; issued by her client is not cogent evidence of an employment relationship. Counsel explained that there are manifold tests to determine whether such a status exists. United Kingdom cases on the Control Test , the Integration Test and the Economic Reality Test were cited as follows:-

- "The control test. In other words, did the party control the worker? See Yewens v Noakes (1880) 6QBD 530.
  See also Westall v Richardson [1954] 1 WLR 905.

- The integration test. In other words, did the nature of the work of the worker form an integral part of the business of the alleged employer? See Stevenson, Jordan and another v Mac Donald and Evans [1952] 1 TLR 101.

- The economic reality test. This outlines that a combination of factors go towards determining whether there is an employer/employee relationship. For instance, whether the worker obtained vacation leave, sick leave, casual leave, from the alleged employer? Or, whether the worker was dependent on the alleged employer for his livelihood? Or, whether the worker's job was an integral part of the employer's business? Or, did the worker or the employer provide tools or equipment? Or, was there any contract of employment (oral or written) between the worker and the alleged employer? Or, does the alleged employer control the worker?
  See Market Investigations Ltd. v M.O.S.A. [1969] 2 WLR 1.
  See also: Fall v Hitchen [1973] 1 AER 368."

In considering the Company's submission regarding tests traditionally used to prove an employment relationship, the Court must also consider modern workplace arrangements and their impact on principles of good industrial relations practices in Trinidad and Tobago and globally. A perspective on this concern stated in ***Smith and Wood's Industrial Law, 8th Edn at page 32*** is that the traditional approach is ***"too simplistic to fit our diverse workforce, and leaves too many people potentially in a hole in the middle."***

Contemporary analysis recognizes the complexities occasioned, particularly where there may be elements of overlapping otherwise called triangular or tripartite relationships affecting a worker. There may for instance be one relationship with an "agency" which pays the worker and another with a "user" which normally orders how the work is done and takes the direct benefit of the services provided.[1] Workers in this situation are seen as exposed to risk of injustice as both agency and user may deny employer status.[2]

The ILO in guiding member states on methods to address such potential injustice provides in R. 198 Employment Relationship Recommendation, 2006 that:-

> "the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work, and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contracted or otherwise, that may have been agreed between the parties."

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[1] Labour Law by Deakin & Morris, 4th Edn at 172

[2] Usually there is less difficulty in establishing that the agent who pays the worker must be held responsible as his employer. In Trinidad and Tobago however, it may be more difficult for the 'user' to deny employer status as Section 2 (4) (b) of the IRA deems the user to be the employer under a labour only contract. See also TD 1 40/1982 Rio Claro Brick Works Ltd and ATS&GWU and Cyril Thomas delivered on 28th July, 1983

It is further recommended that members implement by legislation or by other means specific indicators of the existence of an employment relationship. Among these, the fact of periodic payment of remuneration to the worker and the fact that such remuneration constitutes the worker's sole or principal source of income, are recommended indicators.

Recent case law from the United Kingdom provides other indicative factors which have guided the determination as to employment status in circumstances of overlapping relationships. In Motorola Ltd. v. Davidson & Melville Craig Group Ltd. [2001] IRLR 4, a Mr. Davidson was recruited by Melville Craig Group Ltd for a mobile phone analyzer position at Motorola. He was assigned to work at Motorola and in return Motorola paid Melville Craig Group Ltd for his services. Eventually, he was suspended and then dismissed pursuant to disciplinary proceedings undertaken by a Motorola Manager. The Employment Appeals Tribunal [EAT] had to determine whether the first instance Tribunal correctly concluded that as between Motorola and Mr. Davidson there existed the right of the former to control the latter to a degree sufficient to enable the Tribunal to regard Motorola as the Employer. Among the indicators examined were the following:-

- The recruitment process – Motorola controlled the specifications for prospective employees.
- Mr. Davidson went through induction with Motorola.
- He received instructions from Motorola Employees.
- He used Motorola's tools.
- If he had a grievance he contacted his Motorola supervisor.
- He obeyed Motorola factory rules.

- He was disciplined by Motorola employees while Melville Craig Ltd's representatives knew nothing about the disciplinary problems at all.

On these facts the EAT dismissed Motorola's appeal and agreed with the Tribunal's finding that Mr. Davidson's employer was Motorola. This approach by the EAT is reflected in other decisions and also accords with the guidance provided by the ILO. This approach can in our view be taken as evidence of principles of good industrial relations practices whereby in cases of disguised work relationships the worker must, where the practical reality of his status allows, be protected from loss of recourse to an Employer.

Applying current principles of good industrial relations practices outlined above to the instant case and having weighed all the evidence, the submissions in denial of Tri-Star (Latin America) Limited's status as Employer were not persuasive in our view.

It cannot in the circumstances of this case be accepted firstly that the unchallenged evidence of periodic payments and tax deductions made by the said Company in relation to the Worker for three (3) years, do not represent strong indicators of an employment relationship. We hold further that, on the evidence before us, the Union made out a prima facie case that there were several other indicators of this relationship.

This was evident in the recruitment process despite the use by Mr. Bertrand of an EHS Limited letterhead. The use of this letterhead, in view of the admitted lack of involvement of that Company in the employment arrangement, seemed only to reinforce in our view the characteristics of disguise in this employment relationship.

Mr. Bertrand issued instructions to the Worker thereby indicating control by Tri-Star (Latin America) Limited in the management process. There was no evidence of such control exercised by the TRHA or the SWRHA, as the operational management team at EHSTT was not employed by the RHA's. Additionally, the evidence of disciplinary proceedings taken not by the RHA's but by the Pilot Project EHSTT managed, according to the Worker, by Tri-Star (Latin-America) Limited, further indicated employer status.

In this context, the Union discharged any preliminary onus it may have had in proving that it had reported the correct party as employer. Since the contention that this was not so was raised by the Company there was an onus on that party to prove it. The allegation that the Tobago RHA and/or the SWRHA were employers at the time of the demotion was not borne out at all in evidence led by the Company. The clear pattern of employment procedures involving the RHA's was that this was done by written contract setting out all terms and conditions. No evidence of such a contract covering the date November 11, 2002 was presented by the Company.

Additionally, there was no evidence of any employment relationship indicators, such as those relied on in the Motorola case pointing to the RHA's as being the true employers or even in the traditional sense applying the control test, the integration test or the economic reality test. Finally, there was no evidence to show that the Worker was required to provide services for the RHA's or any other legal entity. Accordingly, no end user, under a labour only contract, could be deemed employer instead of the Company, under S. 2 (4) (b) of the Industrial Relations Act.

In written closing arguments by the Company it was further contended that the Union did not challenge the alleged status of the Company as merely a disbursement agency. This contention is clearly incorrect as the case for the Union as supported by oral and documentary evidence was that the Company was the employer.

On the other hand the letters relied upon by the Company as proving the Company's status as mere disbursement agents were of little weight, as there was no evidence that the Worker was made aware of this status and informed as to the identity of the principal. It is our finding that the Company therefore held itself out as acting on its own behalf in paying the Worker and carrying out all the other actions which indicated an employment relationship.

On the whole of the evidence before us we are unable to uphold the contention that the Company is not the Worker's employer. In this regard we note the submission by Counsel that "the records will show" that an order was made by His Honour Mr. Bernard in this dispute refusing an application for an injunction and that the basis for this ruling was that the injunction was sought against the wrong party. The Court's records concerning this dispute which have been examined revealed no such ruling. Instead, the records show that then Chairman, His Honour Mr. Bernard considered the question concerning employer status still open for determination, as he directed that the parties file submissions on it. In any event, our findings in this dispute are based solely on the evidence presented before us at the hearing and the documents filed by the parties as aforementioned.

Decision

The Union in this Trade Dispute has established and we so find on a balance of probabilities, that the Company, by its conduct towards the Worker and based on indicators in the relationship with the Worker, was in fact the Worker's employer.

It is our further finding based on the unchallenged evidence on events surrounding the November 11, 2002 action taken against the Worker, that the Worker suffered hardship due to the harsh and oppressive circumstances of the action. The said action though expressly stated as "relieving the worker of extra responsibilities" in effect amounted to a demotion from a position he held for approximately two and a half 2½ years, in a supervisory capacity. The fact that the supervisory position was lost with immediate effect and with no prior warning exacerbates the harshness of the action. The action taken could in the circumstances have been deemed a Constructive Dismissal had the Worker not decided to continue in the demoted position, while seeking the Court's intervention to reinstate him in the position.

It is in this context that the Union's claim not only for compensation based on the quantum of earnings reduced but also damages for hardship suffered, is reasonable.

It is our order therefore that the Company, Tri-Star (Latin-America) Limited pay to the worker, Mr. George Hazel the amount of fifteen thousand ($15,000.00) dollars damages on or before February 28, 2007.

E.J. Donaldson-Honeywell
Chairman

V.E. Ashby
Member

J. Rajkumar-Gualbance
Member