



Court file number SC – 19 – 4750 – 00

ONTARIO
SUPERIOR COURT OF JUSTICE
(Toronto Small Claims Court)

BETWEEN:

CARRIE EKLUND

Plaintiff

-and-

ACTRA PERFORMERS RIGHTS SOCIETY and ACTRA NATIONAL

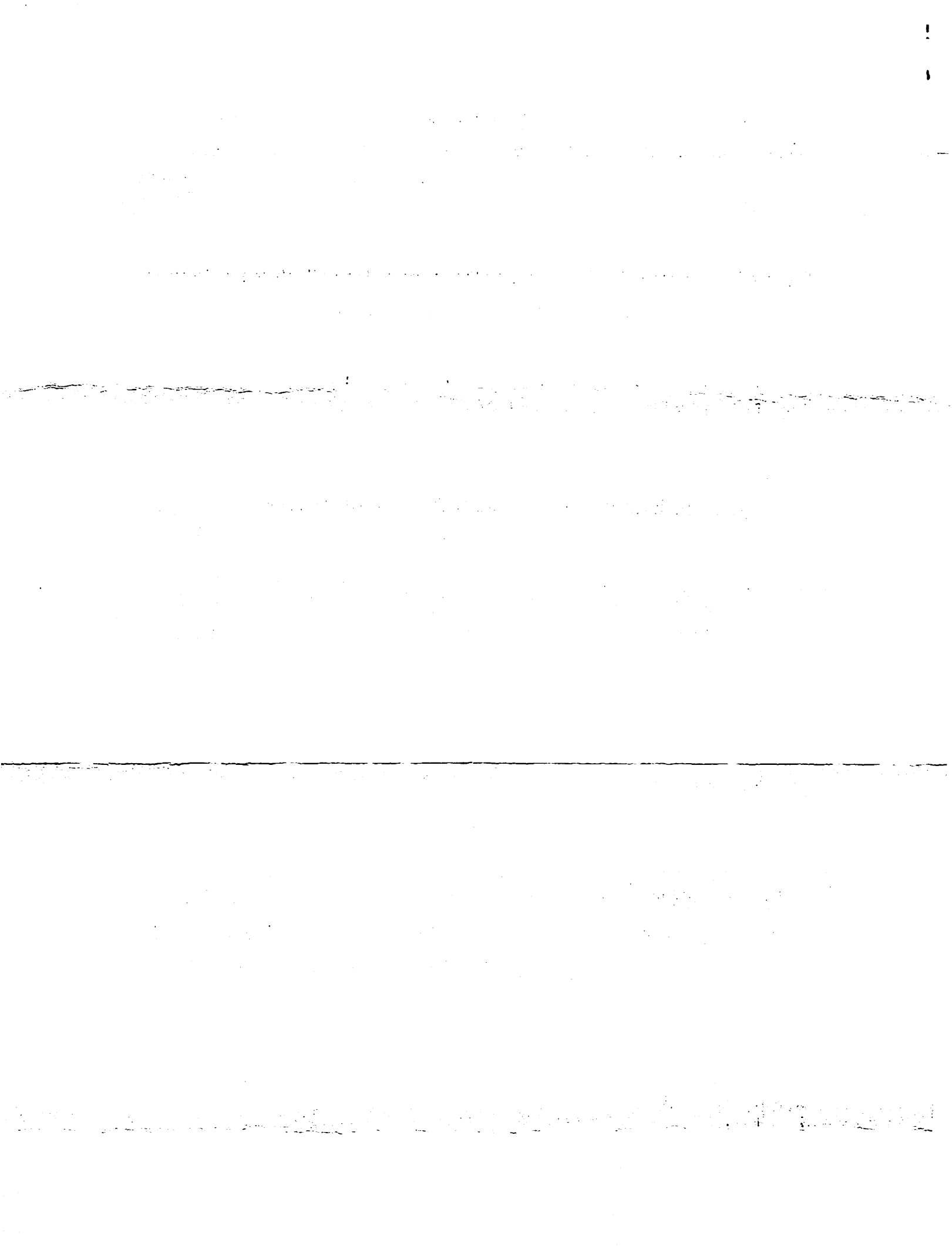
Defendants

Counsel for the Plaintiff: Ms. Monkhouse

Counsel for the Defendants: Mr. Shaffir

REASONS FOR DECISION ON MOTIONS

- [1] The defendants move for an order striking the following paragraphs of the plaintiff's amended statement of claim, namely paragraphs 1A, 22 – 26, 1E, 27 – 28, 1F and 29 – 30.
- [2] The plaintiff moves for an order for production of documents by the defendants.
- [3] The plaintiff is a member of the defendant ACTRA National [Actra]. The defendant ACTRA Performers Rights Society [Actra PRS] is a division of Actra.



- [4] The parties agree that the plaintiff worked on a movie known as The Witch. Work on that movie was governed by a collective employment agreement by which the producer of the movie recognized Actra as the exclusive bargaining agent of performers.
- [5] The plaintiff herself signed a contract dated May 5, 2014 with the producer of the movie, and agreed to be bound by the terms of the collective employment agreement.
- [6] As a result of her performing in that movie, the plaintiff is entitled to compensation. It is the quantum of that compensation that forms the basis of her claim.
- [7] The producer of the movie reports to Actra the income received from various sources, and Actra PRS calculates and distributes to the plaintiff what Actra PRS says the plaintiff is entitled to under the terms of the collective employment agreement and the individual contract signed by the plaintiff
- [8] The basis for the defendant's motion is found in the well-known principle that if a claim arises from the interpretation, application, administration or alleged violation of the agreement the courts are deprived of jurisdiction.¹
- [9] The question is not the legal characterization of the claim but whether the facts in dispute fall within the ambit of the jurisdiction of the Ontario labour Relations Board.
- [10] I have reviewed the several cases provided to me. The defendants submit that what the plaintiff is claiming is a breach by the union of its duty of fair representation. I disagree. The plaintiff is not alleging that the union failed to properly represent her, but that the union in its role as a distributor of funds has improperly calculated the amount due to her.
- [11] I found the decision the Ontario Labour Relations Board in MacKay v. The Ontario Public Service Employees Union² to be particularly persuasive. At paragraph 52 the Board stated "The duty of fair representation is not a "catch all"

¹ Weber v. Ontario Hydro [1995] 2 S.C.R. 929

² 2017 CanLII 37458

governing a union's conduct towards its members in general. The union must be acting in its representative capacity with an employee's employer."

[12] Paragraph 1A of the amended claim seeks damages in the amount of \$9930.84 for breach of contract relating to the miscalculation of "units" in respect of The Witch production.

[13] The particulars of this claim are found in paragraphs 22 to 26. In those paragraphs the plaintiff alleges that Actra PRS wrongfully determined the number of units she is entitled to under the terms of the collective employment agreement and Actra's own policies. That allegation, in my opinion, is that Actra PRS is miscalculating the plaintiff's entitlement on its own interpretation of the method of calculation set out in article B512 of the collective agreement and its own policies.

[14] Thus, it is not a question of a workplace dispute alleging a failure of representation which requires such a dispute to fall within the ambit of the jurisdiction of the Ontario Labour Relations Board.

[15] Paragraph 1E of the amended claim seeks damages in the sum of \$11,500 for breach of contract relating to the improper collection or improper calculation of the plaintiff's entitlements.

[16] The particulars of that claim are found at paragraphs 27 and 28. The plaintiff alleges that The Witch production has registered a worldwide revenue of approximately US dollars 40 million. The plaintiff goes on to allege that Actra PRS did not properly calculate her entitlement on the basis of that worldwide revenue. Although not stated in the amended claim, but is set out in her affidavit and emails produced, the plaintiff is basing this allegation on the claim that the producer has not included in its calculation of income, receipts from the theatrical showing of the movie.

[17] As I understand the collective employment agreement, the producer is entitled to exclude that income, and that exclusion is specifically noted on the plaintiff's individual contract.

[18] Again, the plaintiff's allegation is a question of calculation. It is a question arising from the union's interpretation of the terms of the collective agreement

and personal contract. Whether the claim can succeed given the terms in question will be a matter for the trial judge.

[19] Paragraph 1F of the amended claim is a claim for \$500 of punitive, moral and/or aggravated damages. Mr. Shaffir acknowledged during the course of argument that this Court can award such damages, and it will be a matter for a trial judge to determine whether the plaintiff has led evidence to support such a claim, the particulars of which are found in paragraphs 29 and 30 of the amended claim.

[20] The motion of the defendants is therefore dismissed.

[21] There are conflicting decisions of the Small Claims Court concerning the court's ability to order production of documents. I am of the opinion that I do have jurisdiction. However, the defendants have offered to allow the plaintiff and her counsel to inspect the records that they hold at the offices of counsel. The defendants object to copying this material on the basis that confidential and commercially sensitive information may be disclosed.

[22] I find that for the time being this arrangement of inspection should meet the aims of the plaintiff. If difficulties arise or there is a failure to allow full inspection, this aspect can be revisited.

[23] On that basis I dismiss the plaintiff's motion.

[24] As success has been divided, I decline to award any costs.

Casey DJ