EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Janox Fluid Power Ltd.
("Janox")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/883, 97/884, 97/885, 97/886 and 97/887

DATE OF DECISION: April 15, 1998

DECISION

OVERVIEW

This decision addresses five appeals filed pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Janox Fluid Power Ltd. ("Janox") of Determinations of a delegate of the Director of Employment Standards (the "delegate"), all dated November 6, 1997. Those Determinations concluded Janox owed a total amount of $10,634.56 in respect of the employment of five employees: Dennis Berg ("Berg"), Lance Matthew ("Matthew"), John Dunleavy ("Dunleavy"), Ken Larson ("Larson") and Robert Patrick Harroff ("Harroff"). Janox says the Determinations are wrong and advances several reasons in each appeal for their position.

The Tribunal has decided these appeals can be decided without the necessity of a hearing.

ISSUES TO BE DECIDED

A number of reasons have been advanced by Janox in each of their appeals, but all of the reasons fall into one of two issues: first, whether the delegate erred in applying the relevant provisions of either the *Act*, the *Skills Development and Fair Wage Act* (the *"SDFWA"*) or the *Skills Development and Fair Wage Regulation* (the *"Regulation"*); and, second, whether Janox has established, on balance, that the delegate erred in his calculations of time worked or wages paid.

FACTS

The delegate concluded that all the individuals had worked for Janox on the Duke Point Ferry Terminal project ("Duke Point") in Nanaimo from February 3, 1997 to, and including, April 4, 1997. He found the project was covered by the requirements of the *SDFWA* and *Regulation*. Berg, Matthew and Dunleavy worked on the project as pipefitters; Larson worked on the project as a welder and Harroff worked on the project as a labourer.

With one exception, Janox takes no issue with those conclusions. They say, however, that Berg worked at Duke Point from March 24 to April 18, 1997, working in the Janox shop in Richmond until that date fabricating and assembling the components for Duke Point, as well as performing other work not related to that project. In reply, Berg acknowledges he worked primarily in the shop until March 24, preparing and assembling cylinders for the project, and agrees he did not go to Duke Point to install what he had fabricated in the shop until March 24. The material on file indicates the conclusion of the delegate about the term of Berg's employment at Duke Point is wrong. Berg did not commence his employment at Duke Point until March 24, 1997. On the other hand, the material on file does not bear out the assertion that Berg left the site on April 18, 1997. The material supports a conclusion that he was on site for 33 days between March 24 and May 31 and I make that finding.

Because none of the individuals lived in Nanaimo, where the project was located, three, Matthew, Dunleavy and Larson were given a "daily allowance" and some reimbursement of travel expenses, Berg was provided with a hotel room, given a meal allowance and some reimbursement for travel, and travel related, expenses and paid travel time. The travel time paid was for a ferry trip from the shop to Nanaimo each Monday morning and for the return trip each Friday evening during those weeks he was on the project site. Harroff was provided with accommodation in Nanaimo and given some reimbursement for travel expenses and food costs.

It is asserted by Janox that Berg was receiving a benefit plan fully paid by the company. Berg, in reply, denies this. There is no support in the material on file to show Janox provided and paid the cost of a benefit plan for Berg. Janox says that four of the employees, Matthew, Dunleavy, Larson and Harroff added 0.5 hour to their time cards whenever they worked 1½ hours or more of overtime. They argue this should not be included in the wage calculation.

Finally, Janox says the individuals were paid vacation pay and were paid for the Good Friday general holiday, March 28, and did not work it. The employees who filed submissions agree they received general holiday pay for March 28 and did not work that day.

When the complaints of the individuals were investigated by the delegate, Janox provided, in response to a Demand for Employer Records, certain information, including:

> a copy of the "conditions of employment" given to each employee when starting work;
> permanent employee file on Berg;
> copies of expense and living allowance cheques;
> weekly time sheets showing the hours of work and the job performed for each employee;
> attendance sheets for each employee, which included a breakdown of straight time, time and one half and double time hours, hours paid and sick days banked; and
> copies of statements showing all information contained on the pay stub of each employee.

When providing this information to the delegate, Janox also invited him to notify them if that information did not "cover everything".

Janox did not comply with the recording requirements found in section 9 of the *SDFWA* or subsection 3(2) of the *Regulation*. This is hardly surprising since it appears Janox did not comply with any part of the *SDFWA* or *Regulation*. Janox contends, however, that they paid more than the required $4.00 an hour as "benefits" to the individual.

ANALYSIS

Janox makes a number of arguments and assertions in support of its appeals:

1. It says the employees received total benefits in excess of the $4.00 an hour required by the *SDFWA*, including ferry fares, mileage, telephone, accommodation, food allowance, gas, daily allowance, lost tool reimbursement, WCB premiums, employment insurance payments, Canada Pension Plan contributions, company medical and dental benefits and general holiday and vacation pay;

2. It says the travel time paid to one employee was not work and the time spent traveling should have been deducted from any calculation of hours worked;

3. It says 0.5 hour added by employees to their time cards when 1.5 hours or more of overtime was worked should not have been included in the calculation of hours worked;

4. It says one of the employees asked to be paid as a subcontractor and that request should be honoured; and

5. It says some of the employees had requested to work a Saturday in exchange for a long weekend and Janox should not have to pay overtime for that day, even though it resulted in a work week in excess of 40 hours.

I will deal first with the assertion by Janox that they paid more "benefits" to the individuals than is required by the *SDFWA and Regulation*. For the purpose of the appeal, Janox provided a list of the "benefits" given to the individuals and the cost of those "benefits". Included in the list are ferry fares, mileage, telephone, accommodation, food allowance, gas, daily allowance and lost tool reimbursement. Janox also says it paid WCB premiums and unemployment insurance premiums, made Canada Pension Plan contributions and paid general holiday and vacation pay. Janox says, taken over the duration of the project, the amount paid to the individuals as "benefits" exceeds the $4.00 an hour amount required to be paid according to the *SDFWA* and *Regulation.*

Except as noted later, there is no merit to this argument. The *Regulation* defines "benefits" in Section 1:

> *1. In this regulation:*
>
> ***"benefits"** includes vacation pay, general holiday pay, sick leave, construction industry trust funds, medicare premiums, group life insurance, long term disability insurance, and employer contributions to pension plans other than the Canada Pension Plan, but does not include*
>
> *(a) employer contributions to the Unemployment Insurance Commission, the Canada Pension Plan and the Workers Compensation Board, or*
>
> *(b) allowances for dirty pay, danger pay, first aid pay, shift differentials, overtime, standby, call-out, travel allowances, room and board allowances, or other allowances provided to a worker;*

None of the "benefits" Janox claims it paid to the individuals, with the exception of vacation pay and general holiday pay, are considered "benefits" for the purposes of the *SDFWA* and *Regulation* and cannot be applied against the obligation to pay the minimum fair wage rate found in Schedule 3 of the *Regulation*. With respect to vacation pay and general holiday pay, there is an issue that arises, and which will be addressed later, about whether those benefits should have been treated by the delegate as meeting part of the "benefit" obligation of Janox under the *SDFWA* and *Regulation*.

Before dealing with that issue, I will dispose of the other arguments made by Janox. The answer to each of these arguments is found in the *Act*, which applies to the employment of the employees engaged at Duke Point which are not otherwise governed by the *SDFWA* and *Regulation*. The *Act* defines work:

> ***"work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

In *Carol Lacroix and Kevin Lacroix, operating Lone Wolf Contracting*, BC EST #D267/96 (affirmed on Reconsideration, BC EST #D230/97) the Tribunal said that travel time would not be considered "work" unless the circumstances in which the claim for travel time arose demonstrated some compelling reason to do so. I find such circumstances in this case. The employee who received travel time, Berg, was, for the period he worked at Duke Point, instructed by Janox to report each Monday morning to the Janox shop in Richmond, load the company vehicle and catch the first ferry to Nanaimo, where he would stay for the week, returning on Friday evening with the company vehicle so the process could be repeated the following Monday morning. Traveling with the company truck, in those circumstances, was a "service" being provided by Berg to his employer at the request of the employer. That travel time constitutes "work" under the *Act* and Janox is required to pay wages in respect of it.

Section 32 of the *Act* says:

> *32. (1) An employer must ensure*
>
> *(a) that no employee works more than 5 consecutive hours without a meal break, and*

> *(b) each meal break lasts at least ½ hour.*
>
> *(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.*

Typically, an employee working an eight hour day will receive a meal break after four hours of work and will become entitled to a second ½ hour meal break after 9½ hours of work. If the entitlement period is worked, it must be paid as time worked. Janox bears the burden of persuasion in this case and has not shown that the 0.5 hour should not have been treated as time worked and included in the calculation of hours worked.

Section 4 of the *Act* says:

> *4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

The assertion by Janox that some employees asked to work a Saturday in return for a long weekend and the company agreed is not conceded by the employees. However, I do not need to decide the factual dispute, because such an agreement had no effect in any case as it constituted an agreement to waive the weekly overtime provisions of the *Act*. Once that agreement was set aside, the delegate concluded the overtime provisions in the *Act* applied to the work performed on that day. There is no error in that conclusion.

Similarly, the suggestion by Janox that Harroff asked to be treated as a subcontractor cannot be used to decide his status for the purposes of the *Act* or the *SDFWA*. The material on file shows there has never been an issue about whether he meets the definition of "employee" under either of the statutes and, simply put, there is no basis in any event for such an argument. It is also noteworthy that Janox never directly asserts Harroff was not an employee, it simply asserts that he asked to be paid as a contractor and some unsuccessful calls were made to him to make arrangements for that. Even if Janox took the position that Harroff was not an "employee" for the purposes of the *Act* and the *SDFWA*, the burden of establishing that position is on them and they have not met that burden.

Returning to the "benefit" issue, the question of whether the delegate erred in concluding Janox did not pay any of the benefits required under the *SDFWA* has two aspects, a factual aspect, which has partially been addressed above, and an interpretive aspect. The former is whether Janox did, in fact, pay any general holiday or vacation pay to the employees. The latter is whether, for the purposes of the *SDFWA*, it is considered to be "paid" if Janox has failed to pay it and record it in the manner required by the *SDFWA* and *Regulation*.

In its appeal, Janox asserted strongly that the employees had been paid, and given time off, for the general holiday that occurred during their employment and had been paid vacation pay at the conclusion of their employment. They said the payroll records, which were available to the delegate, verified both those assertions. The delegate, in his Determination, had indicated quite clearly that "there was no indication [on the daily time sheets or the pay stubs] of any benefits being paid" and had concluded that "Janox failed to pay the proper . . . benefits" to the employees. In his response to the appeal, the delegate made the following submissions on the "benefit" issue:

> In the appeal filed by Janox Fluid Power issues as to benefits paid arose. For the purpose of the Skills Development and Fair Wage Act, benefits are defined as follows: . . .
>
> Benefits must be identified on each pay statement. . . .

> Benefits must be paid in the following fashion, if the cost of the benefits do not equal the minimum hourly benefit rate on the appropriate schedule, the employer must "top-up" the employee's hourly rate of pay by the difference.
>
> If the employer "tops-up" the employee's hourly rate in this manner it must be clearly identified on each pay statement.
>
> The records that the employer provided did not show that any benefits were paid on behalf of any employees.

The material submitted by Janox in response to a request by the Tribunal for further information, however, shows quite clearly that the employees had received pay for the general holiday that occurred during their employment and most employees had received vacation pay. Janox said the latter payment was made at the conclusion of each individual's employment and was deposited directly to the individual's designated account. All the employees who responded to the same request agreed they had been paid general holiday pay and had not worked the general holiday that occurred during their employment. Berg acknowledges he "was paid the minimum holiday pay as required by law". The other employees neither dispute nor agree they received vacation pay. Matthew says he looked through his documentation and it did not "clearly" show that Janox paid vacation pay. Dunleavy says he has no recollection of receiving vacation pay on completion of the job. Harroff says he can find no indication on his pay slips that vacation pay was paid. Larson did not respond. Neither the Director nor the delegate responded.

The information provided by Janox supporting its contention that employees were paid vacation pay consisted of copies of the final pay statements for Berg, Matthew, Dunleavy and Larson. Each of those statements show the pay period, the pay rate, start date for the employee, base earnings for the pay period and year to date, total overtime hours, total hours, a breakdown of total hours at straight, 1.5 and double time, vacation pay paid, deductions for the period and year to date and net pay for the period and year to date. Based on that material, I conclude that Berg, Matthew, Dunleavy and Larson received an amount for vacation pay at the conclusion of their employment. The material leaves some doubt whether the amount they received is 4% of their total wages. The material provided by Janox does not support the assertion that Harroff was paid an amount for vacation pay and I conclude he was not.

That leaves the interpretive aspect of the question. Although general holiday pay and annual vacation pay are included in the term "benefit" under the *SDFWA*, the delegate found that no benefits had been paid by Janox to the employees. Factually, that conclusion is wrong and unless such a conclusion is justified because Janox failed to show the payment of benefits in the manner contemplated in Section 9 of the *SDFWA* and failed to clearly set out the amount of the "top-up" as required in subsection 3(2) of the *Regulation* the Determinations will have to be set aside and referred back to the delegate.

The relevant parts of section 9 of the *SDFWA* read:

> *9. (1) Employers must keep the following for each employee for a period of one year after completion of a construction project:*
>
> *. . .*
>
> *(c) a record of wages and benefits paid to the employee;*
>
> *. . .*
>
> *(2) An employer must, on every pay day, give to each employee a written statement of wages and benefits paid*

> *to the employee for the pay period and the statement must include the following information:*
>
> . . .

Section 9 of the *SDFWA* is an enforcement provision. It is in the statute primarily for the purpose of ensuring that proper records exist in the event an issue arises about whether fair wage has been paid. There is nothing in the section that adds to the essential substantive obligation found in Section 5 of the *SDFWA* which reads:

> *5. All employees of a contractor, subcontractor, or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must be paid fair wages in accordance with the regulations.*

Section 3(2) of the *Regulation* contains another recording requirement, but substantively it does no more than support the primary substantive obligation in Section 5 of the *SDFWA*, requiring the fair wage to be not less than the minimum compensation in column 4 of Schedule 3 even if the benefits paid are less than $4.00 an hour. More importantly, it does not add to the obligation found in Section 5 or require an employer to pay more than the fair wage if the "top-up" is not clearly shown. Nor are there any other provisions in the *Regulation* that obligate an employer to pay more than the fair wage for inadequate record keeping or for failing to properly apply the *SDFWA* to its employees.

There is no doubt that an employer who fails to comply with *SDFWA* or the *Regulation* runs a significant risk. Section 5 of the *Regulation* lists the consequences of failing to comply, and those include termination of the contract, withholding payment on the contract and holding back funds to cover claims arising from the failure to comply. However, that section does not include, as a consequence of failing to comply, paying more than the obligation found in Section 5 of the *SDFWA*.

Sections 11 and 12 of the *SDFWA* establish provisions for enforcing the administrative sections of the legislation and for imposing fines upon employers who contravene those sections:

> *11. If the director is satisfied that a person has contravened section 4, 6, 9 or 10, the director may make one or more orders requiring the employer to do one or more of the following:*
>
> *(a) comply with the section;*
>
> *(b) remedy or cease doing the act.*

Section 12 makes a contravention of the legislation or neglect or refusal to comply with an order under Section 11 an offence and makes the offender liable to be fined up to $10,000.00.
The point of the above analysis is that I can find nothing in the *SDFWA* that contemplates a contravention of Section 9 will cause the employer to be required to pay an employee more than the fair wage it is statutorily obligated to pay under Section 5. That, however, is the effect of what the delegate has done in this case. In my opinion it is wrong and must be corrected. It is a question of fairness. I can think of no compelling policy reason why Janox should not be credited with the general holiday and vacation pay paid to employees, even if it did not comply with the administrative requirements of the *SDFWA*. A failure to comply with those requirements can be addressed through the compliance provisions in the *SDFWA*.

One more comment needs to be made as I do not wish to be misunderstood on this point. The obligation to show the employees have been paid the fair wage rate set out in Schedule 3 is on Janox. In this case, there is no dispute that all the individuals were paid for the general holiday which occurred during their fair

wage employment and that some employees were paid an amount as vacation pay at the conclusion of their employment. The records provided by Janox support that conclusion. If there were no records and there was a dispute or some doubt about whether the primary obligation to pay employees fair wage had been met, it is unlikely Janox would be found to have met its burden and the result would be different, as it is in the case of Harroff (see also **Kanaka Ridge Steel Erecting Ltd.**, BC EST #D072/98).

To summarize, I have reached the following conclusions on these appeals:

1. All the employees were paid general holiday pay and received time off for the general holiday occurring during their employment at Duke Point;

2. Berg, Matthew, Larson and Dunleavy were paid vacation pay at the conclusion of their employment with Janox, although it must be confirmed that the amount paid was equal to 4% of total wages;

3. Janox has failed to prove, although given an opportunity to do so, that Harroff was paid any amount of vacation pay;

4. Janox paid some "benefit", specifically general holiday and vacation pay, to employees and the amount paid to each employee should have been included in the calculation of wages owed for each employee;

5. Berg was employed under the terms of the *SDFWA* for 33 days between March 24, 1997 and May 31, 1997; and

6. In all other respects the appeals are dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations, all dated November 6, 1997, in favour of Dennis Berg, in the amount of $2299.89, Lance Matthew, in the amount of $1635.87, John Dunleavy, in the amount of $1624.24, Ken Larson, in the amount of $1700.54, and Robert Patrick Harroff, in the amount of $3374.02, be canceled and referred back to the delegate to recalculate the amount owing based on the conclusions reached in this decision and subject to confirmation that the amounts paid as vacation pay to Berg, Matthew, Dunleavy and Larson are 4% of the total wages earned by those persons under the *SDFWA*.

David Stevenson
Adjudicator
Employment Standards Tribunal